CRITICAL INDIGENOUS AND AMERICAN INDIAN STUDIES

Andrew Jolivette
General Editor

Vol. 1

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Amy L. Casselman

Injustice in Indian Country

Jurisdiction, American Law, and Sexual Violence Against Native Women

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Brussels • Vienna • Oxford • Warsaw

Library of Congress Cataloging-in-Publication Data

Casselman, Amy L.
Injustice in Indian country: jurisdiction, American law, and sexual violence against native women / Amy L. Casselman.
pages cm. — (Critical indigenous and American Indian studies; vol. 1)
Includes bibliographical references.
1. Criminal jurisdiction—United States. 2. Indians of North America—Legal status, laws, etc. 3. Indians of North America—Criminal justice system. 4. Sex crimes—Law and legislation—United States. 5. Indian women—Crimes against—United States. I. Title.
KIE3336.C37 345.73'0122—dc23 2015016347
ISBN 978-1-4331-3109-7 (hardcover)
ISBN 978-1-4539-1601-8 (e-book)
ISSN 2376-547X (print)
ISSN 2376-5488 (online)

Bibliographic information published by **Die Deutsche Nationalbibliothek.**
Die Deutsche Nationalbibliothek lists this publication in the "Deutsche Nationalbibliografie"; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de/.

The paper in this book meets the guidelines for permanence and durability of the Committee on Production Guidelines for Book Longevity of the Council of Library Resources.

© 2016 Peter Lang Publishing, Inc., New York
29 Broadway, 18th floor, New York, NY 10006
www.peterlang.com

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Printed in Germany

To all missing and murdered women
To survivors
And to all those who fight for justice

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CHAPTER THREE

Historicizing Jurisdiction in Indian Country

> Renee Brewer, a victim's advocate for the Citizen Potawatomi Nation remembers a woman who had been assaulted and called the police. With the attacker still hiding in the woman's closet, four different law enforcement agencies argued on the front lawn about whose case it was. As Brewer stated, "Then you wonder why these cases are not getting prosecuted—because the United States government made it as difficult as possible for us to handle our own prosecution on our own land."
>
> —Laura Sullivan[1]

When Europeans first arrived in the Americas, they were simultaneously confronted with a wealth of natural resources and the Native people who owned, occupied and managed these resources.[2] In order to justify the conquest of both the land and the people that they encountered, Europeans needed a way to legitimate the theft of resources from people with a pre-existing right to them. These first justifications came in the form of law.[3]

Using Papal Bulls (decrees from the Catholic Pope viewed as supreme law), the first Europeans in the Americas were able to legalize the colonization of Native lands and the enslavement of Native people.[4] With a legal justification for their presence secured, Europeans were able to continue to settle in the Americas, eventually forming the colonies that would become the United States. And throughout its development, the United States continued to use law to legitimate its own existence as a settler-state on Native land.[5]

The body of law that governs the relationship between Native nations and the United States of America is known as federal Indian policy. Federal Indian policy has defined and codified the legal relationship between Native people and the U.S. federal government through laws, executive orders, and Supreme Court cases.[6] Many Native legal scholars argue that while federal Indian policy may at times appear contradictory, it has always been designed to manage the problematic spaces that Native people occupy vis-à-vis the U.S. settler-state.[7] Because Native people have a pre-contact right to land, their existence has always been problematic in that it threatens American hegemony and stands in the way of complete colonization. In an attempt to remedy the "Indian problem," federal Indian policy has vacillated between policies of removal (relocating Native people "out of the way"), physical genocide (annihilating physical bodies) and assimilation (policies that use cultural genocide to assimilate Native people into the fold of American hegemony).[8]

It is against this backdrop of legal violence under colonization that we can begin to situate the emergence of jurisdictional conflicts in the prosecution of sexual violence against Native women. This chapter highlights five specific laws and policies that have directly led to the creation of modern jurisdictional conflicts in Indian country. By positioning these pieces within the trajectory of federal Indian policy, I contextualize the emergence of jurisdictional conflicts as part of a colonial narrative that seeks to divest Native people of their land, resources, and inherent sovereignty as part of managing the "Indian problem." By examining this process, I highlight additional themes that emerge from these specific laws and policies. In doing so, I theorize modern jurisdictional conflicts within a larger narrative of legal violence.

Ex Parte Crow Dog—1883: The Original Jurisdictional Conflict

On August 5, 1881, a Brulé Lakota man named Crow Dog (Kȟaŋǧí Šúŋka) shot and killed Spotted Tail (Siŋté Gleška, also Brulé Lakota) on the Rosebud Indian Reservation. Crow Dog was then tried and convicted for murder by the Dakota Territorial Court and sentenced to death. However, when Crow Dog arrived for his execution, he was told that he was free to go. His conviction had been appealed to the U.S. Supreme Court in *Ex Parte Crow Dog*, who ruled unanimously that the Dakota Territorial Court had no jurisdiction over the Rosebud Indian Reservation. Because this was a crime committed by a Native person, against another Native person in Indian country, the U.S. Supreme Court vacated U.S. territorial jurisdiction and returned it to the Lakota Nation.[9] Under Lakota jurisdiction, instead of the punitive measure of death, the Lakota people called for the restoration of

balance to the community. Lakota law dictated that Crow Dog care for Spotted Tail's family, which included financial and material compensation. Additionally, Crow Dog would no longer be allowed to participate in community activities.[10] Whereas Crow Dog's execution would have done nothing for the Lakota community, Lakota justice effectively addressed Crow Dog's actions while using his life to aid the family that Spotted Tail left behind.[11]

As is almost always the case, local jurisdiction and social control by communities who are most familiar with the needs of their members proved to be an effective mechanism of law and order. As historian Sidney Harring points out in the case of Crow Dog:

> Brule law was functioning and able to settle the dispute [...] It also made sound policy sense: the tribes were best able to adjudicate intertribal dispute [...] whatever the underlying reasons of the killings, the Brule Sioux were in a better position to know and judge them. They had a right to do so. That is the essence of tribal sovereignty.[12]

In addition to making sense from a policy standpoint, it was also the Lakota Nation's legal right to adjudicate the matter. By virtue of the 1868 Fort Laramie Treaty, the Lakota people had the sovereign right to exercise jurisdiction in their communities.[13] While the U.S. Supreme Court agreed, the neighboring white communities were incensed over what they perceived to be "primitive," "uncivilized" tribal justice.[14]

Ex Parte Crow Dog sparked intense outrage by white communities who saw Crow Dog as "getting away with murder."[15] Rather than understand Lakota law as one that was functioning and able to manage the dispute in a restorative way, the white community insisted on capital punishment as the only appropriate mechanism for social control. The unwillingness of the white community to incorporate a Lakota perspective into their understanding of law and order fueled intense fear of lawlessness in and around Indian country. As Native people were constructed as "savage" and "barbarous," Spotted Tail's murder and Crow Dog's subsequent release confirmed these suspicions.[16]

In addition to intense white anxiety over perceived "frontier lawlessness" in Indian country, discourse around *Ex Parte Crow Dog* demonstrates the emergence of a strong civilizing narrative in federal Indian policy. Here, Native justice systems were not only seen as dangerous to surrounding white communities, but also dangerous to Native communities themselves as they allowed savagery to triumph over civilization. As then-Secretary of the Interior Henry Teller noted of Crow Dog's case in 1883:

> [M]any of the [Indian] agencies are without law of any kind, the necessity for some role of government on the reservations grows more and more apparent each day. If it

> is the purpose of the Government [sic] to civilize the Indians, they must be compelled to desist from the savage and barbarous practices that are calculated to continue them in savagery [...][17]

Perceived notions of savagery presented a distinct problem for the federal government. At the time of *Ex Parte Crow Dog*, Indian country was seen as a lawless space that was dangerous to surrounding white communities.[18] In order to address this problem, Native people would need to be civilized. Therefore, white anxiety over Crow Dog's case was not just about fears of lawlessness, but also that the civilization of Native people, as part of remedying the so-called "Indian problem," would be disrupted if Crow Dog was to be left to "uncivilized" "tribal justice."[19] As Deloria and Lytle note:

> [...] to give compensation for a murder instead of invoking the death penalty, was considered a symbol of continued savage resistance to the overtures of a sincere "civilized" efforts to assist the Indians. All that people knew, or understood, was that the federal government was releasing rather than executing an admitted murderer.[20]

In Crow Dog's case, pervasive stereotypes of Native people and profound anxiety over lawlessness created a climate in which Native justice itself was constructed as a threat to proximate white communities and to American hegemony as a whole. As we see from Deloria and Lytle's commentary, there is a dichotomy between civilization and savagery in *Ex Parte Crow Dog* where the triumph of Lakota justice signaled a disruption in the civilizing mission of American law and policy. Within the narrative of perceived lawlessness in Crow Dog's case, a subtext emerges that integrally links the protection of non-Native bodies with a civilizing agenda. This transitory narrative in which Native people can evolve from savagery into civilization through the colonization of their governments by American law serves the dual purpose of addressing the "Indian problem" through assimilation, while also quelling white fears of perceived lawlessness in Indian country.

After *Crow Dog*, the federal government felt it had to act quickly to assuage white American fears of Indian country lawlessness while simultaneously repositioning Native peoples onto the trajectory of civilization. To accomplish these goals, Congress passed the Major Crimes Act.[21]

The Major Crimes Act—1885

Less than two years after the U.S. Supreme Court overturned Crow Dog's conviction, the Major Crimes Act was signed into law. The Major Crimes Act extends

jurisdiction over certain "major" crimes committed in Indian country to the federal government.[22] If the Major Crimes Act had been passed before the murder of Spotted Tail, Crow Dog would have almost certainly been executed. Though only two paragraphs long, the Major Crimes Act is a substantial encroachment on Native sovereignty that continues to impact Native communities today. As negative ideological constructions of Native people were codified into law, the fear of Native savagery facilitated the divestment in Native self-determination that laid the foundation for contemporary jurisdictional conflicts.

Though white fear over perceived lawlessness was central to the creation of the Major Crimes Act, the impetus behind the law was also deeply paternal. As legal scholar Philip Prygoski notes of the Major Crimes Act, "The underlying theory was that tribes were not competent to deal with serious issues of crime and punishment,"[23] signaling that both Native and non-Native communities could only be adequately protected from Indian country violence by the federal government. As Wayne Ducheneaux, former President of the National Congress of American Indians remarked in a 1991 Senate subcommittee meeting:

> [O]ur method of dealing with [murder] was Crow Dog should go take care of Spotted Tail's family, and if he didn't do that we'd banish him from the tribe. But that was considered too barbaric [...] so they passed the Major Crimes Act that said we don't know how to handle murderers and they were going to show us.[24]

Ducheneaux's statement highlights the idea that Native law was read as an absence of law, and that in order for the federal government to complete its civilizing mission, it was necessary to colonize Native justice systems themselves. Ducheneaux implicates the twin narratives of paternalism and civilization present in the creation of the Major Crimes Act. Here, the Act not only "protects" white people from the perceived lawlessness of Native communities, but it also "protects" tribes from themselves. While Native justice was considered "barbaric," Western-style justice would be able to show Native nations how to properly handle major crimes, thereby aiding in their civilization.[25]

Furthermore, in protecting tribes from their own barbarity while mollifying white communities, Congress was also able to address the "Indian problem," by readying Native nations for assimilation into the body of the American politic. As scholars Carol Lujan and Gordon Adams note, the Major Crimes Act was consistent with a trend towards "policies of dependency and systematic assimilation."[26] Here, the Major Crimes Act was not just about protecting the individual interests of neighboring whites who feared Native lawlessness, but it was also about protecting the United States' vested interests in assimilating Native people in the interest of resolving the "Indian problem."

Though passed over one hundred years ago, the Major Crimes Act is still the law of the land today and continues to be one of the first major inroads into Native jurisdictional sovereignty.[27] By trumping Native jurisdiction, the Major Crimes Act overrode treaties established between many Native nations and the U.S. government that stipulated jurisdictional autonomy. For example, though the Fort Laramie Treaty of 1868 guaranteed jurisdictional authority for the Lakota people (as demonstrated in *Ex Parte Crow Dog*), the Major Crimes Act effectively abrogated this provision without the consent of Native constituents. As such, the Major Crimes Act set the stage for further encroachments into tribal sovereignty.[28]

Through its effect on tribal sovereignty, the Act laid the foundation for modern jurisdictional conflicts. The Major Crimes Act drastically affects Native jurisdiction by introducing a separate sovereign into Indian country. As a result of the Major Crimes Act, when a crime occurs, one must first determine the type of crime (major or non-major). Then a two-pronged system of jurisdictional authority must be navigated in which Native nations and the federal government may have either exclusive or dual jurisdiction over the same crime.[29] And, as the following sections will show, subsequent laws and policies have exacerbated problems stemming from the Major Crimes Act, creating additional jurisdictional complexity.

The Dawes General Allotment Act—1887

During the same legislative era as *Ex Parte Crow Dog* and the Major Crimes Act, the General Allotment Act (Dawes Act) of 1887 was passed. While not specifically targeting reservation crime or jurisdiction, the Dawes Act had dramatic and enduring effects on the racial and spatial character of Indian country. Since jurisdiction is first predicated on location, the changing composition of reservation communities under Dawes continues to have deleterious effects on the ability of tribal communities to manage the activities on their land.[30]

The same desire to assimilate Native people into "civilized" Anglo-American society that was present in the Major Crimes Act is a major component in the creation and implementation of the Dawes Act.[31] Under this Act, reservation land that was guaranteed by right of treaty to Native nations as sovereign territory was divided into individual parcels by the federal government. These parcels were then distributed to individual Indian people. Rather than having a large area on which to live communally, many Native nations were divided and individual Indian people were allotted plots of land. The size of an individual Indian's parcel was usually 160 acres, often awarded to male heads of a nuclear household.[32] As former President Theodore Roosevelt put it, this strategy was designed as a "mighty pulverizing engine to break up the tribal mass," by replacing communal landholdings with individual ones.[33]

In an effort to remedy the "Indian problem," the Dawes Act was an assimilative effort to mold Native peoples into Euro-American farmers.[34] While the Major Crimes Act used "law and order" to "civilize" Native people, the Dawes Act used patriarchy and Euro-American gender roles. As Andrea Smith argues in *Conquest: Sexual Violence and American Indian Genocide*, land division under the Dawes Act was designed to inscribe hierarchies into non-hierarchical people in order to better control and assimilate the population as a whole.[35] If Native people could be civilized through agriculture and land privatization, the logic went, they could then be brought into the fold of white American hegemony and cease to be a cultural and financial burden on the United States. And, if Native men could be taught to control Native women under the Dawes Act (through male land ownership, patrilineal inheritance, shifting women out of the public and into the private sphere), then the U.S. could solve the "Indian problem" through dividing and conquering.[36]

While the assimilationist impulse behind the law was genuine, the desire to "civilize" Native people through the Dawes Act was a distant second to the primary goal of appropriating Native land for white settlement. As members of Congress who opposed allotment noted, "The real aim of [allotment] is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them."[37] Under the Dawes Act, after all individual Indian parcels were allocated, whatever land was "leftover" was conveniently freed up for the U.S. government to dispose of. This "surplus" land could then be used for railroads, extracting natural resources, and for white settlement.[38] When the Dawes Act was passed in 1887, Indian landholdings were estimated to be approximately 138 million acres. By the time the Allotment Era ended with the passage of the Indian Reorganization Act in 1934, this number had been reduced to 48 million acres—a total loss of approximately two-thirds or ninety million acres. This is an area about the size of Montana.[39]

Though the Allotment Era ended in the 1930s, the effects of the Dawes Act persist. In addition to illegally divesting Native peoples of the land guaranteed to them by treaty, the Dawes Act introduced a large population of white settlers into land previously occupied exclusively by Native nations.[40] Land that was once a large, relatively homogeneous space was divided into small parcels on which Native and non-Native families lived in close proximity. Allotments owned by Native individuals were interspersed with parcels owned by private American citizens, state governments, and the federal government. In jurisdictional terms,

this "checkerboarding" made the boundary between Native and non-Native land shift from being relatively distinct to impossibly entangled.[41] Inheritance policies written into the Dawes Act exacerbate this entanglement through a phenomenon called "fractionation." Because the Dawes Act divided Native parcels equally among children upon the death of the head of household, individual parcels have subsequently gotten smaller and smaller. Today, more than 100 years after the Dawes Act became law, some individual plots have been reduced to less than one square foot of ground.[42]

The implications of the Dawes General Allotment Act in Indian country jurisdiction are profound. As jurisdiction is predicated on the location of a crime, the Dawes Act has made determining whether a parcel in Indian country is governed by tribal, state, or federal entities exceptionally complex. Additionally, the inundation of Indian country with non-Native residents has complicated matters further, as increased interactions between white Americans and Native people form the foundation of subsequent federal Indian policy that challenges Native jurisdictional sovereignty.

Public Law 280–1953

Though policies of outright physical annihilation of Native peoples were abandoned by the middle of the twentieth-century, the U.S. federal government was still deeply entrenched in addressing what it continued to see as the "Indian problem." In exchange for vast tracts of land, the federal government entered into what is known as a "trust relationship" with Native peoples. Under the trust relationship, the federal government became the trustee of Native resources and, in exchange, guaranteed that it would provide vital services to Indian country and protect Native land and sovereignty.[43] While the federal government enjoyed the economic resources it acquired through treaties, by the 1950s it was reluctant to use any of these resources to make good on its responsibilities to Native people.[44] Under the trust relationship, the "Indian problem" endured as Native people stood in the way of complete American hegemony. In an effort to "solve" this "problem" Congress entered into what historians have dubbed the "Termination Era."

Starting in the late 1940s, Congress used federal Indian policy to "terminate" the relationship between the federal government and Native people to "get out of the Indian business."[45] To accomplish this, Congress ignored its own policies that recognized the sovereignty of Native people and the rights that they maintained through treaties, and began to sever the trust relationship, reduce funding to Indian

country, revoke federal recognition of Indian tribes, and relocate Native people to urban areas.[46] It is in this context that Congress created Public Law 280.[47]

Public Law 280 (PL 280) was a driving force in Termination Era policies. According to Deloria and Lytle, the goal of PL 280 was "terminating federal supervision over Indians and their property with the ultimate goals of assimilating them into American society and eliminating the reservation enclaves of Indian culture."[48] Central to this goal was the massive restructuring of criminal jurisdiction in Indian country. Without the consent of tribes or states, PL 280 transferred criminal jurisdiction in Indian country to state governments in six mandatory states: California, Minnesota (except the Red Lake Nation), Nebraska, Oregon (except the Warm Springs Reservation), Wisconsin (except later the Menominee Indian Reservation) and, upon its statehood, Alaska.[49] Although only six states were mandatory PL 280 states, these six states contained 359 of the over 550 federally recognized tribes at the time, affecting over 65% of Native nations.[50] Other states in addition to the mandatory PL 280 states were allowed to opt-in to the system, and since then Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa and Utah have adopted PL 280.[51] While previous legal statutes had guaranteed Native nations freedom from state jurisdiction,[52] Public Law 280—in its quest to dissolve the federal relationship with Native nations—ignored this and granted states sweeping criminal jurisdiction in Indian country.

Though financial motivations to dissolve federal relationships with Native nations were driving forces behind the law, PL 280 reveals familiar themes of lawlessness as central to its formation. After the Dawes Act ushered in large communities of white settlers in and around Indian country, the new non-Native residents were quick to express profound anxiety over the activities in Indian country, describing Native people as "disorderly and incapable of self-government"[53] and Indian country as places of "rampant crime and disorder."[54] Native justice systems were again constructed as weak and ineffective, while federal jurisdiction was considered distant and limited.[55] While the Major Crimes Act had intended to address concerns of lawlessness in Indian country, transferring jurisdiction to the federal government had merely created a system in which a distant and unresponsive federal government had failed to address law and order at all.[56] This was exacerbated by Termination Era policies that severely cut vital services to Native nations, impeding Native communities from maintaining law and order through the limited jurisdictional authority that they still maintained. Ironically the result was that the very system that had sought to address fears of lawlessness had, in reality, created a very real sense of lawlessness in Indian country.[57]

To address the reality of lawlessness that emerged as the result of its own policies, some scholars note that the federal government could have addressed the issue by strengthening tribal justice systems.[58] Native nations had always had fully functioning systems of law and order, and it wasn't until this system was disrupted that a true sense of lawlessness began to emerge.[59] However, funding Native nations did not fit with an assimilationist paradigm and was especially incongruent with Termination Era policies of dissolving federal relationships with tribes. Instead, the federal government decided to legislate over the problem by passing PL 280 and farming out federal jurisdiction to state agencies. This accomplished several goals of the Termination Era project: it saved the federal government money as it took steps to "get out of the Indian business," it severed federal relationships with Native nations, and it quieted white anxiety over perceived lawlessness by transferring jurisdiction to state authorities.[60]

While Congress acted ostensibly to address white fears of lawlessness, it was readily apparent that dissolving its financial responsibility to Native nations was more important than addressing concerns over law and order in earnest. As one publication put it, "Congress was concerned about satisfying the law and order demands of Anglos living on or near reservations, but only so long as the federal government did not have to pay."[61] The transfer of jurisdiction to state governments under PL 280 turned out to be an unfunded mandate. Under PL 280, state governments were forced to manage crime on reservations, yet did not receive any additional funding to do so. With no funding from the federal government, and with no tax revenues generated from reservations within their boundaries, state governments were reluctant to use any of their resources on law enforcement in Indian country. This had major consequences as Native infrastructure weakened and state governments refused to fill any law enforcement shortfalls. As Goldberg and Champagne note:

> Public Law 280 was supposed to provide the solution to the problem of "lawlessness" by empowering state civil and criminal courts to do what the tribal and federal systems supposedly could not. Ironically and tragically, however, Public Law 280 has itself become the source of lawlessness on reservations.[62]

Called "one of the most bold and discriminating actions against Natives in the legal and judicial system,"[63] PL 280 had devastating effects on Native nations, which continue to manifest today. As an unfunded mandate, state law enforcement in Indian country has become sporadic.[64] As a divestment in tribal sovereignty, Native nations have been unable to exercise local control over the activities in their own community.[65] While this contributes to an overall sense of lawlessness in general, PL 280 also contributes to the creation and maintenance of modern jurisdictional conflicts in particular.[66]

In an attempt to terminate federal responsibility over Native people, PL 280 introduced a third sovereign into the jurisdictional schema in Indian country. While the Major Crimes Act introduced the federal government as a second sovereign (sometimes competing with and sometimes usurping tribal jurisdiction), under PL 280, state governments became a third entity with which to negotiate jurisdiction. While these complications make crime in Indian country more difficult to adjudicate in general, it has a disproportionate impact on Native women, as cases of sexual assault often fall through the cracks.[67]

Oliphant v. Suquamish Indian Tribe—1978

As a direct result of Allotment Era policies, the Port Madison Indian Reservation located in northwest Washington is home to a large number of non-Native residents. By the 1970s, approximately 63% of the reservation was owned by non-Native individuals, living alongside Native families on a checkerboard of individual parcels.[68]

In August 1973, Mark David Oliphant, a non-Native resident, allegedly assaulted a Suquamish tribal police officer and resisted arrest. Oliphant was arrested and charged by tribal police.[69] Though Oliphant is a non-Native person, treaties with Native nations have consistently recognized Native jurisdiction over non-Native perpetrators. This jurisdictional language was often repeated in treaties with various tribes. For example Article V of the 1785 Treaty of Hopewell with the Cherokee states:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands [...] which are hereby allotted to the Indians [...] such persons shall forfeit the protection of the United States, and the Indians may punish him or not as they please.[70]

After his arrest, Oliphant appealed his case to local courts who rejected it, citing the inherent sovereignty of the Suquamish to maintain law and order within their communities.[71] This was in accordance with previous case law, as well as with treaties signed by other tribes. Oliphant then appealed this decision to the U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe*, and on March 6, 1978, the Supreme Court reversed the lower court's decision. Ruling that Native nations do not have the legal right to arrest and prosecute non-Native offenders, the court sided in favor of Oliphant in a six to two decision.[72]

The Oliphant decision colonized the inherent (and dually codified) right of pre-constitutional Native nations to govern the people and activities on their own land, and was thus a devastating blow to tribal sovereignty.[73] Under *Oliphant*, Native nations were prohibited from exercising jurisdiction over non-Native individuals on Indian land. While the authority to maintain local control within a society is central to maintaining law and order, the Oliphant decision denies Native communities this basic tenet of self-determination. As Lujan and Adams note, "Oliphant strikes directly at the heart of a tribe's ability to protect itself by institutionalizing discourses that deny tribal police the protection and authority that every other community in America bestows on their police."[74]

The background and discourse around the Oliphant case reveals familiar themes of racism and paternalism. At the time of Oliphant's arrest, the Suquamish had a fully functioning Western-style court system. Yet, as a white American, Oliphant was relieved of his responsibility as a Suquamish community member. Despite the fact that the Suquamish had "elevated" themselves to the level of American judicial hegemony, the federal government viewed them as somehow short of truly entering American civilization. The outcome of *Oliphant* indicates that even the "civilizing" project of previous federal Indian policy was not enough to trump the enduring myth of Native savagery, and begs the question: what, if anything, can?[75]

Paired with the myth of Native savagery, white anxiety over Native lawlessness endures in *Oliphant*. In the majority opinion, Justice William Rehnquist cited a previous case, *In re Mayfield* to justify his ruling against the Suquamish:

> In *In re Mayfield* (1891) the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization."[76]

In *In re Mayfield*, white fears of the perceived violence and danger of Native communities were enmeshed with the civilizing mission inherent to the assimilationist paradigm of federal Indian policy. *Mayfield* indicates that divesting Native nations of their inherent and pre-existing sovereign right to exercise jurisdiction in their own communities served a dual purpose: it protected white bodies, while also delivering Native people into civilization. Rehnquist's decision to use the racist language of *In re Mayfield* in *Oliphant* reflects this—his argument essentially being that since the U.S. Supreme Court has already acted in favor of protecting white interests and "civilizing" Native nations, that the current court must follow suit. Despite noting in *Oliphant* that "Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians,"[77] Rehnquist still insisted on leveraging the power of the U.S. Supreme Court to effectively do so. Here, Rehnquist chose to engage with the vague and racist statute set in *In re Mayfield*, rather than uphold tribal sovereignty which had been clearly expressed in the form of many constitutionally binding treaties.

The Oliphant decision is one of the most significant blows to tribal sovereignty in American history and is a major factor in the development of modern jurisdictional conflicts. As one scholar notes, "Today, thanks to *Oliphant*, non-Indians know that practically no one has criminal jurisdiction over them on the Indian reservations,"[78] creating a climate in which violence against Native people is often met with impunity. Like PL 280, *Oliphant* illustrates the colonial irony that the *fear* of lawlessness by white communities creates a very *real* sense of lawlessness for Native people in Indian country.

Conclusion

The epigraph at the beginning of this chapter tells of a victim's advocate recounting a night when four different law enforcement officers chose to argue over jurisdiction rather than confront the perpetrator or address the needs of the survivor. The advocate states, "Then you wonder why these cases are not getting prosecuted—because the United States government made it as difficult as possible for us to handle our own prosecution on our own land."

This chapter argues that the U.S. government has, indeed, made it as difficult as possible for Native people to manage their own prosecutions on their own land. Though control over the activity on one's land is fundamental to community safety, the U.S. federal government has consistently encroached upon this sovereign right, transforming law and order in Indian country from something that was once local and efficient, to one that is distant and largely ineffective. While some legal scholars treat jurisdictional conflicts as collateral damage from a complicated yet necessary system needed to address the "unique" legal relationship between the federal government and Native nations,[79] I have demonstrated that this is not the case. Instead, jurisdictional conflicts are the direct result of federal Indian policy that has consistently used legal violence as a method to colonize Native land, assimilate Native people, and "solve" the "Indian problem."

Additionally, a closer examination of these five pieces of law and policy reveals more subtle themes. *Ex Parte Crow Dog*, the Major Crimes Act, the Dawes General Allotment Act, Public Law 280, and *Oliphant v. Suquamish Indian Tribe* each demonstrate that the policies most directly responsible for the creation of modern jurisdictional conflicts are also marked by paternalism, a civilizing mission,

investment in white American hegemony, protection of white bodies from the perceived threat of Native savagery, the protection of white economic and social interests, divestments in tribal sovereignty, and the colonization of Native justice systems. In turn, it becomes impossible to separate the motivations behind these policies from their results, as jurisdictional conflicts *themselves* emerge as marked by these themes. Thus, when four law enforcement agencies argue on the front lawn of a Native woman's home as her attacker remains hidden in the closet, hundreds of years of federal policy are inscribing legal violence on her and her community. Paternalism, divestments in tribal sovereignty, and investments in white American hegemony are literally part of the violation that this woman experiences as her attack is met with impunity. Jurisdictional conflicts, the history of federal Indian policy, and legal violence can therefore not be separated. While this affects all Native people in Indian communities, this type of legal violence often affects Native women in particular. The next chapter illustrates the way these laws shape the experience of Native women in Indian country, arguing that sexual violence against Native women today is structured by this history of legal violence against Native communities as a whole.

Notes

1. Laura Sullivan, "Legal Hurdles Stall Rape Cases on Native Lands," *National Public Radio* 26 Jul. 2007.
2. Barbara Perry, *Policing Race and Place in Indian Country: Over and Underenforcement* (New York: Lexington Books, 2009): 35.
3. Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press: 1990) 6–8.
4. Ibid. See also Wilcomb E. Washburn, *Red Man's Land/White Man's Law: The Past and Present Status of the American Indian* 2nd Edition. (Norman: University of Oklahoma Press, 1971) 5.
5. Ibid.
6. Steven Pevar, *The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian Tribal Rights* (Carbondale: Southern Illinois University Press, 1992) 4.
7. See for example: John Vinzant, "A Brief History of Federal Indian Policy." *The Supreme Court's Role in American Indian Policy.* 2009.
8. Helton and Robertson, "Foundations of Federal Indian Law."
9. Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994) 129–141.
10. Mary Crow Dog, *Lakota Woman* (New York: Harper Perennial, 1990) 183.
11. Steve Russell, "Making Peace With Crow Dog's Ghost: Racialized Prosecution in Federal Indian Law," *Wicazo Sa Review* (Spring 2006): 61.

12. Sidney Harring, "Crow Dog and the Western Justice System," *Tribal Criminal Law and Procedure*, eds. Sarah Deer and Carrie E. Garrow (New York: Altamira Press, 2007) 50.
13. Ibid.
14. Perry, *Policing Race and Place* 36.
15. Deloria and Lytle, *American Indians, American Justice* 169–170.
16. Perry, *Policing Race and Place* 36.
17. As quoted in Perry *Policing Race and Place* 36.
18. Thomas Biolsi, "Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle," *American Ethnologist* 32.2 (2005): 244.
19. Perry, *Policing Race and Place* 36.
20. Deloria and Lytle, *American Indians, American Justice* 169–170.
21. Eileen Luna-Firebaugh, *Tribal Policing: Asserting Sovereignty, Seeking Justice,* (Tucson: University of Arizona Press, 2007) 33; Pevar, *The Rights of Indians and Tribes* 78.
22. When first passed, the Major Crimes Act included "major" crimes such as murder, manslaughter, kidnapping and rape. Since its passage, the Major Crimes Act was amended to include many other felony crimes including robbery, incest, sexual abuse of a minor, and assault with a deadly weapon (Pevar, *The Rights of Indians and Tribes* 144–145).
23. Philip J. Prygoski, "From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty," *American Bar Association* (Fall 1995): 2.
24. "Indian Civil Rights Act": Hearing Before the Select Committee on Indian Affairs, 102nd Cong. 42 (1991) as quoted in Pisarello, "Lawless By Design" 1515.
25. Sarah Deer and Carrie E. Garrow, eds. *Tribal Criminal Law and Procedure.* (New York: Altamira Press, 2007) 45.
26. Carol Lujan and Gordon Adams, "U.S. Colonization of Indian Justice Systems: A Brief History," *Wicazo Sa Review* 19.2 (2004) 16.
27. "Sexual Assault in Indian Country: Confronting Sexual Violence," *National Sexual Violence Resource Center.* Web. (2000): 6. <http://www.nsvrc.org/_cms/fileUpload/indian.htm> Accessed 12 Apr. 2011. (Quoting the work of Sarah Deer, draft document prepared in support of changes to federal legislation, University of Kansas, School of Law, 1997).
28. Deer, "Sovereignty of the Soul."
29. Garrow and Deer, *Tribal Criminal Law* 93–94.
30. Lujan and Adams, "U.S. Colonization of Indian Justice" 16.
31. Biolsi, "Imagined Geographies" 244.
32. Pevar, *The Rights of Indians and Tribes* 8–9.
33. Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.–Indigenous Relations* (Minnesota: University of Minnesota Press, 2007) 94.
34. Biolsi, "Imagined Geographies" 244.
35. Smith, *Conquest.*
36. Ibid.; Mihesuah, *Indigenous American Women.*
37. "Lands in Severalty to Indians: Views of the Minority." *Index to the Reports of Committees of the House of Representatives for the First and Second Sessions of the Forty-Sixth Congress 1879–1880.* Volume 5—Nos. 1521–1793. Washington, D.C.: Government Printing Office, 1880: 10.
38. Pevar, *The Rights of Indians and Tribes* 70, 99, 121–122.

39. Charles F. Wilkinson and Christine L. Miklas, *Indian Tribes As Sovereign Governments: A Sourcebook on Federal-Tribal History, Law and Policy* (Oakland: AIRI, 1988) 9–10.
40. Larson, "Making Sense of Federal Indian Law" 14.
41. Ibid., 20.
42. 1922 report from the General Accounting Office, cited by Brian Sawers, "Tribal Land Corporations: Using Incorporation to Combat Fractionation," *Nebraska Law Review* 88.2 (2009): 398.
43. Pevar, *The Rights of Indians and Tribes* 32–41.
44. Vanessa J. Jimenez and Soo C. Song, "Concurrent Tribal and State Jurisdiction Under Public Law 280," *American University Law Review* 47.1627 (1998).
45. Luana Ross, *Inventing the Savage* (Austin: University of Texas Press, 1998) 24.
46. Ibid.
47. Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1997) 122.
48. Deloria and Lytle, *American Indians, American Justice* 175.
49. Pevar, *The Rights of Indians and Tribes* 123–125.
50. Jimenez and Song, "Concurrent Tribal and State Jurisdiction" 1634.
51. Ibid.
52. *Worcester v. Georgia* (1832). For a discussion of this case see Joanne Barker, "For Whom Sovereignty Matters" *Sovereignty Matters*, ed. Joanne Barker (Lincoln: University of Nebraska Press, 2005): 6–11.
53. Carole E. Goldberg, "Public Law 280," *American Indian Treaties Publication* (Los Angeles: University of California, Los Angeles American Indian Culture and Research Center. Series No. 1, 1975) 4.
54. Goldberg and Champagne 1996, referenced in Sarah Deer, "Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State," *The Color of Violence* 35.
55. Ross, *Inventing the Savage* 24.
56. Luna-Firebaugh, *Tribal Policing* 25.
57. Deer, "Federal Indian Law and Violent Crime" 35.
58. Pommersheim, *Braid of Feathers* 122.
59. Ibid.
60. Luna-Firebaugh, *Tribal Policing* 117.
61. Goldberg, "Public Law 280" 3.
62. Quoted in Deer, "Federal Indian Law and Violent Crime" 35.
63. Ross, *Inventing the Savage* 24.
64. Deloria and Lytle, *American Indians, American Justice* 176.
65. Deer, "Sovereignty of the Soul" 462.
66. Luna-Firebaugh, *Tribal Policing* 25.
67. This will be explored at length in Chapter Four.
68. *Oliphant v. Suquamish Indian Tribe.* 435 U.S. 191. U.S. Supreme Court, 1978.
69. Ibid.

70. Treaty of Hopewell as quoted in Kevin Meisner, "Modern Problems" 190. See also Article V of the 1785 Treaty with the Wyandot, Delaware and Others and Article IV of the 1830 Treaty with the Choctaw.
71. Bruce Duthu, *American Indians and the Law* (New York: Penguin Group, 2008) 19–20.
72. *Oliphant v. Suquamish.*
73. Luna-Firebaugh, *Tribal Policing* 31.
74. Lujan and Adams, "U.S. Colonization of Indian Justice" 19.
75. Please note that I am in no way encouraging the adoption of Western systems of government in Native communities. I am only using this example to demonstrate that even when Native nations complete the civilizing mission of American legal hegemony, they are still denied legitimacy as a governing body. For more on this, see my discussion of VAWA 2013 in Chapter Six.
76. *Oliphant v. Suquamish* 115–116.
77. Ibid.
78. Meisner, "Modern Problems" 206.
79. See for example Loy, "Criminal Law."

CHAPTER FOUR

Jurisdiction and Sexual Violence Against Native Women

> It's rape tourism, right here in Oklahoma, South Dakota, Alaska, and any place where the confusing mess of jurisdictional issues allow perpetrators to hide. Are there even words to describe this evil?
>
> —Andy Ternay[1]

Chapter Three demonstrates that legal violence has been used as a colonial tool to "solve" the social, political, legal, and physical aspects of the "Indian problem." However, to give the impression that law has been the *principal* tool of colonization would be incorrect. In fact, just as legal violence was present at first contact, so too was sexual violence against Native women.[2] While federal law constructed Native communities as unfit for political sovereignty, social constructions of Native women by colonizers portrayed Native women as having no right to corporal sovereignty.[3] By using sexual violence as a weapon, colonizers attempted to control Native nations as a whole by targeting Native women in particular. In this context, both sexual and legal violence became fused in a comprehensive colonial approach to address the problematic space that Native communities have always occupied vis-à-vis the American settler-state.

By reading sexual violence in tandem with law, I argue that non-Native criminal impunity in Indian country is not simply collateral damage from a legal system that by nature must be complex. Instead, I demonstrate the ways that modern

jurisdictional conflicts are the direct result of federal policy that has *always* been characterized by both legal and sexual violence against Native people. In this chapter, I theorize sexual violence in a colonial-legal context, while demonstrating the real effects that jurisdiction has on contemporary Native women. By highlighting the way that jurisdictional conflicts disproportionately affect Native women by allowing impunity for sexual assault, I support my thesis that the confluence of legal and sexual violence present since European contact continues to maintain and inscribe colonial violence on the bodies of Native women in Indian country today.

Determining Jurisdiction in Indian Country

Regardless of her racial identity, when a woman is sexually assaulted outside of Indian country, jurisdiction is relatively straightforward. If it happens on state land, for example, it generally falls under state jurisdiction and goes to a district court (see Figure 1).[4] When a woman is sexually assaulted in Indian country however, the jurisdictional scheme is quite different. In Indian country—because of the Major Crimes Act, Public Law 280, *Oliphant*, and recently the Violence Against Women Reauthorization Act of 2013—the type of crime, exactly where it occurred, the racial identity of the perpetrator and victim, and the nature of their relationship to each other and to the community all play key roles in determining jurisdictional authority.[5]

Because of the Major Crimes Act, when a crime is committed in Indian country, the type of crime (major or non-major) must be determined. Sexual assault is always considered a "major" crime and the Major Crimes Act applies.[6] Here, the Major Crimes Act immediately introduces a second sovereign in addition to the Native nation. While non-major crimes may fall under the sole jurisdiction of the tribe, major crimes introduce either the state or the federal government as a second sovereign that may have either sole jurisdiction over the crime or may share jurisdiction with the tribe. In cases of dual jurisdiction, double jeopardy does not attach because the crime falls under the jurisdiction of separate sovereigns.[7] To determine which second sovereign (the state or the federal government) is introduced under the Major Crimes Act, it is vital to determine exactly where the crime occurred.

If it is determined that all or part of a crime was committed in Indian country, it must then be determined whether or not the land on which the crime was committed is subject to Public Law 280 (PL 280). If it is determined that the assault occurred in Indian country subject to state jurisdiction under PL 280, then the Major Crimes Act introduces that state as a second sovereign. In these cases, depending on the racial identity of the parties involved and the nature of their relationship to each other and to the Native community, the state either maintains sole jurisdiction over the crime or dual jurisdiction shared with the tribe. If it is determined that the assault occurred on land not subject to PL 280, then the second sovereign introduced by the Major Crimes Act is the federal government. Then, depending on the racial identity of the parties involved and the nature of their relationship to each other and to the Native community, the federal government either maintains sole jurisdiction over the crime or dual jurisdiction shared with the tribe.[8]

Determining PL 280 status is often difficult. While the 1953 law initially forced the transfer of federal jurisdiction to six mandatory states, subsequently other states have been allowed to opt in and out of PL 280 status.[9] Some Native nations were once under PL 280 jurisdiction but retroceded from it, creating exceptions to state jurisdiction under PL 280 in some cases. This is the case in the Umatilla Reservation in Oregon, for example, that was once under PL 280, but has since retroceded Oregon state jurisdiction.[10] Also, many states have only limited jurisdiction under PL 280. This means that a state could technically be a PL 280 state, but only have jurisdiction over air and water pollution and no jurisdiction over sexual assault (as is the case in Arizona). Or, a state might have PL 280 jurisdiction over sexual assault, but only if it occurs on highways (as is the case in South Dakota). Alternatively, a PL 280 state might have jurisdiction over civil cases, but not criminal cases (as is the case in Iowa), in which a civil suit against a rapist would fall under state jurisdiction, but a criminal case would not.[11]

Additionally, some reservations are not entirely within the bounds of a given state, sometimes crossing between PL 280 and non-PL 280 states, and even crossing between national borders. Such is the case of the Navajo Nation that spans Arizona, New Mexico and Utah, and the Mohawk Nation of Akwesasne that falls within New York in the United States and the provinces of Ontario and Quebec in Canada. Because of numerous variations and exceptions, determining if state jurisdiction under PL 280 applies can be very complicated.[12]

Yet another difficulty in determining jurisdiction comes from the Dawes Act. The division of Native land under the Dawes Act not only introduced a large white population into Indian country, but also created a checkerboard pattern of land ownership. This process of "checkerboarding" means that the boundaries of Indian country often encompass many tracts of land that are not legally part of Indian country. Because of checkerboarding, even if a survivor knows exactly where she was assaulted within the bounds of a reservation, it is often extremely difficult to find out if that particular parcel of land is technically part of Indian country.[13] As one assistant U.S. attorney remarked, "If it's a parcel of property in a rural area, it may take weeks or months to determine if it's Indian land or not;

investigators usually cannot determine this, they need attorneys to do it by going through court and title records to make a determination."[14]

These difficulties are exacerbated for crimes where the survivor is unable to determine exactly where the assault took place. In cases in which women are blindfolded, drugged, intoxicated, knocked unconscious, and/or transported in moving vehicles, mapping the exact place(s) where the assault occurred can be nearly impossible. Such was the case for two Native women in Oklahoma in 2005:

> In both cases, the women were raped by three non-Native men [...] Because the women were blindfolded, support workers were concerned that the women would be unable to say whether the rapes took place on federal, state, or tribal land. There was concern that, because of the jurisdictional complexities in Oklahoma, uncertainty about exactly where these crimes took place might affect the ability of these women to obtain justice.[15]

Compounding the difficulty of using location as a determinant in Indian country are the identity politics at work in the wake of the Oliphant decision. After the U.S. Supreme Court stripped Native nations of their ability to arrest and prosecute non-Native perpetrators in *Oliphant v. Suquamish*, the racial identities of the parties involved in Indian country crime have become central to determining jurisdiction. Once the type of crime, the location of the crime, and the applicability of PL 280 are determined, the racial identity of the parties involved must be verified to determine jurisdiction.[16] If the perpetrator is non-Native, the victim is Native, and it is determined that the crime occurred in Indian country subject to PL 280, then the state has jurisdiction. If the perpetrator is non-Native, the victim is Native, and it is determined that the assault occurred in Indian country not subject to PL 280, then the federal government has jurisdiction. If both the perpetrator and the victim are non-Native, the state has jurisdiction regardless of PL 280 status. If the assault occurs in Indian country subject to PL 280, the perpetrator is Native, and the victim is Native, then both the state and the Native nation in which it occurred have concurrent jurisdiction. If the assault occurred in Indian country not subject to PL 280 and both the perpetrator and victim are Native, then both the federal government and the Native nation in which the crime occurred have concurrent jurisdiction (see Figures 2–6).[17] Each scenario is also shaped by the relationship between the perpetrator/victim and the perpetrator/Native nation in that in some cases the tribe may extend limited jurisdiction over non-Native perpetrators under Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) when it otherwise would not.

While determining the exact location of an assault and PL 280 applicability can be incredibly difficult, determining the racial identity of those involved can be equally problematic. Despite making sweeping regulations governing the authority to manage crimes that involve "Indians" and "non-Indians," both Congress and the U.S. Supreme Court have failed to provide a consistent definition of who an "Indian" is. In fact, there are dozens of different definitions of the term "Indian" under the law.[18] As Pevar notes:

> Each government—tribal, state, and federal—decides who an Indian is for the purposes of that government's laws and programs. This can result in someone being an Indian under tribal law but not under federal law, under federal but not tribal law, under tribal but not state law, and so forth.[19]

Native identity in the United States is complicated and is often found at the confluence of racial, social, ethnic, and political elements. Often, Indian identity is not simply a matter of blood quantum or enrollment, but also a complex matrix of representation, recognition and active participation[20] that is variously recognized by tribal, state and federal governments. Based on physical appearance, someone may be labeled as "White" or "Black" but may also be an enrolled member of a Native nation. Phenotypically, someone may appear to be Native but have no Native ancestry. Alternatively, someone might be of Yaqui or Tohono O'odham ancestry but was born on the Mexican side of their ancestral homelands, rendering them "non-Indian" in the eyes of the federal government. Similarly, someone might be enrolled in a Native tribe that is not federally recognized, possibly making them "Indian" for the purposes of a state government but not the federal government. Determining Native identity may take a serious investment in not only researching legal enrollment but also in talking to individuals, community members, as well as researching family and oral history. Despite this, law enforcement officials are required to determine the Indian/non-Indian racial identity of the parties involved in a crime in order to adjudicate it.

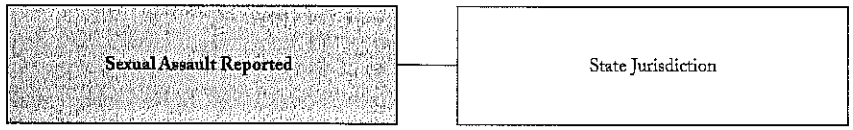

Figure 1. Jurisdiction for Sexual Assault on State Land.[21,22]

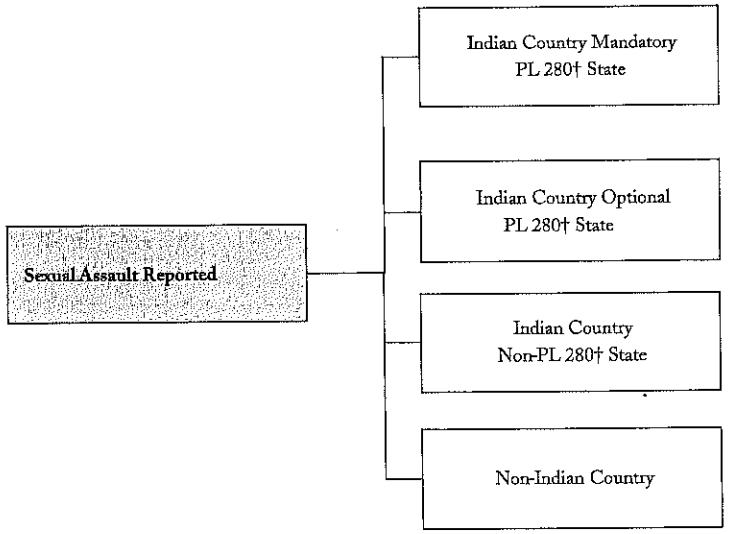
Sexual Assault Reported
Indian Country Mandatory PL 280† State
Indian Country Optional PL 280† State
Indian Country Non-PL 280† State
Non-Indian Country

Figure 2. Types of Land In or Near Indian Country Used to Determine Jurisdiction.

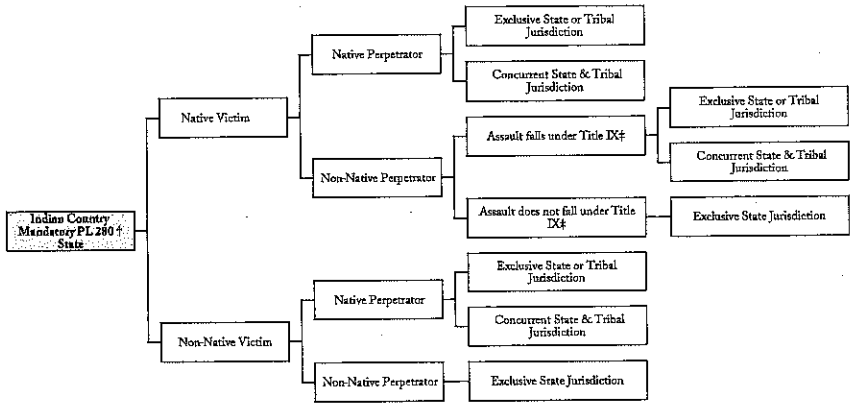

Figure 3. Jurisdiction for Sexual Assault In Indian Country, Mandatory PL 280† State.

† "PL 280" is Public Law 280.

‡ "Title IX" refers to crimes that qualify for special domestic violence jurisdiction under Title IX of the Violence Against Women Reauthorization Act of 2013.

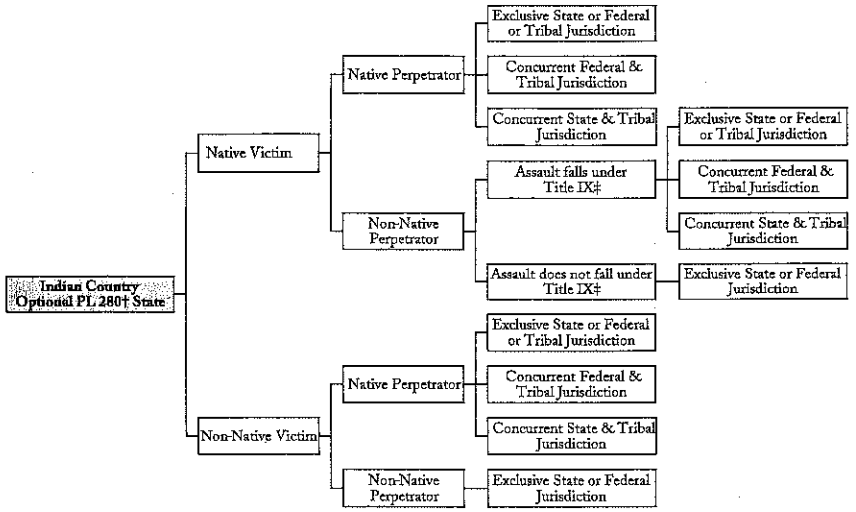
Indian Country Optional PL 280† State
Native Victim
Non-Native Victim
Native Perpetrator
Non-Native Perpetrator
Native Perpetrator
Non-Native Perpetrator
Exclusive State or Federal or Tribal Jurisdiction
Concurrent Federal & Tribal Jurisdiction
Concurrent State & Tribal Jurisdiction
Assault falls under Title IX‡
Assault does not fall under Title IX‡
Exclusive State or Federal or Tribal Jurisdiction
Concurrent Federal & Tribal Jurisdiction
Concurrent State & Tribal Jurisdiction
Exclusive State or Federal Jurisdiction
Exclusive State or Federal or Tribal Jurisdiction
Concurrent Federal & Tribal Jurisdiction
Concurrent State & Tribal Jurisdiction
Exclusive State or Federal Jurisdiction

Figure 4. Jurisdiction for Sexual Assault In Indian Country, Optional PL 280† State.

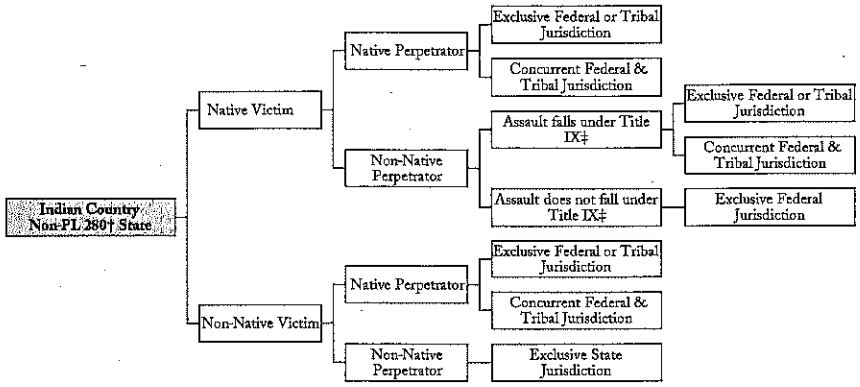

Figure 5. Jurisdiction for Sexual Assault In Indian Country, Non PL-280† State.

† "PL 280" is Public Law 280.

‡ "Title IX" refers to crimes that qualify for special domestic violence jurisdiction under Title IX of the Violence Against Women Reauthorization Act of 2013.

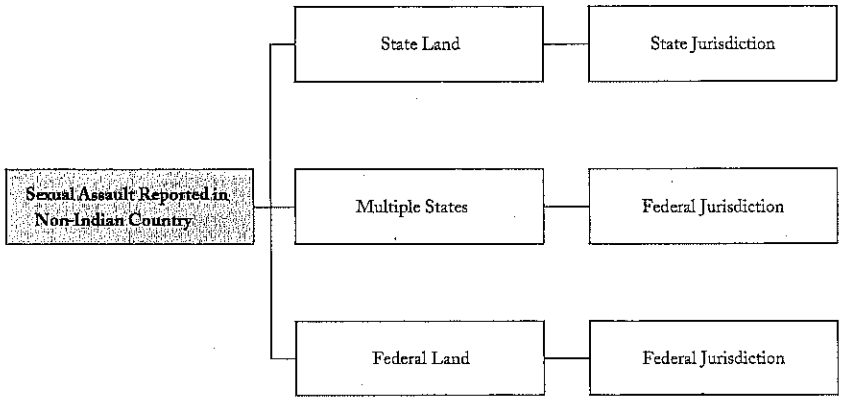

Figure 6. Jurisdiction for Sexual Assault In Non-Indian Country.[23]

Using racial identity as a criterion for arrest and prosecution is a significantly flawed approach to adjudicating crime. In addition to subjecting law enforcement officials to the complex task of determining a racial identity that is not clearly defined, using race as a jurisdictional determinant further marginalizes Native communities by collapsing ethnic identities while giving perpetrators another avenue to manipulate the criminal justice system.

The confusion created when ethnic and racial identities are enmeshed is readily apparent in the 1990 U.S. Supreme Court case *Duro v. Reina* in which Albert Duro of the Torres Martinez Desert Cahuilla Indians was accused of killing a teenage boy in the Salt River Pima Maricopa Indian Community. Here, Duro was clearly an "Indian" yet was not a member of the Native nation in which he committed the crime. This created confusion as it raised the question of whether or not non-member Indians were considered "Indians" for the purposes of jurisdiction.[24] In response, Congress passed the "Duro Fix," which provided that for the purposes of jurisdiction, all Native people—regardless of Native membership—share legal standing as "Indians" for the purposes of prosecution in Indian country.[25]

Considering that each Native nation has its own culture, history, laws and government, folding unique ethnic identities into a monolithic "Indian" racial identity is marginalizing for Native communities. On one hand, the collapse of ethnic identity is paradoxical in a jurisdictional scheme that clearly values the identity of perpetrators; on the other, it is predictable given the history of federal Indian policy. As noted in the previous chapter, federal Indian policy has been designed to protect the civilized "Us" from the savage "Other." The "Other" in this case was all "Indian" people whose savagery was defined simply by failing to be

Euro-American. Though each Native community is unique, they all became the "Indian" "Other" in the eyes of the federal government under the Duro Fix.

Using race as a jurisdictional determinate is additionally problematic when perpetrators use identity politics to avoid arrest. In some cases, suspects have exploited *Oliphant* and the Duro Fix by strategically enrolling or disenrolling themselves from their Native nations to manipulate jurisdiction and sidestep prosecution.[26] The idea that someone can be an Indian while committing a crime, and somehow be a non-Indian while being adjudicated for that crime, is a testament to the arbitrary nature of using racial identity as a criterion for prosecution in Indian country. Or, as was the case in *Oliphant*, the idea that someone could live in a community, assault a member of that community on community land, at an event hosted by that community, yet not be held accountable for their actions by that community, demonstrates the way that identity politics systematically strip Native peoples of their ability to exert meaningful control over the people and activities on their land.

Finally, since the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), the type of assault, the relationship between the perpetrator and the survivor, and the relationship between the perpetrator and the Native community must also be defined in order to determine jurisdiction. While Title IX of VAWA 2013 challenges *Oliphant* to allow tribes to prosecute some non-Native perpetrators, it continues to complicate matters by using the nature of the perpetrator/victim and perpetrator/community relationship as determinants in jurisdiction (see Figures 3–5). Under VAWA 2013, tribes may exert some limited jurisdiction over non-Native offenders if: the perpetrator is an intimate, dating or spousal partner; or if the perpetrator has ties to Indian country as a resident, employee, or romantic partner of a Native community member. This most recent development in Indian country jurisdiction is theorized at length in Chapter Six, however the jurisdictional mechanics resulting from VAWA 2013 will be considered throughout this chapter.

Federal Declination and Impunity

Sexual assault cases in general are difficult to prosecute, but Indian country jurisdiction has exacerbated this challenge, leading to exceedingly high declination rates.[27] In Indian country, criminal proceedings often start with a "mini-trial" to determine jurisdiction.[28] From these mini-trials it could take weeks or months to determine whether jurisdiction is federal, state, tribal, or a combination of two or

more sovereigns.[29] In the meantime, perpetrators can flee and evidence can be lost, mishandled, or degraded—all of which contribute to high declination rates.[30]

When criminal investigations focus on jurisdiction, evidence collection and interviewing people of interest are often postponed. And, if one sovereign entity does collect evidence, it may be thrown out by another agency that may have different standards for chain of custody, search warrants, and evidence collection. Until recently,[31] Indian Health Service (IHS) hospitals had no standard protocols for collecting sexual assault forensic information from Native women who had been raped, and often, this information was not collected at all. When evidence was collected, it was often mishandled or destroyed, and therefore inadmissible in court.[32]

Additionally, although the federal government has a responsibility for providing health care and other basic services to many Native communities, up until recently, IHS facilities often did not have sexual assault forensic examination kits. In some cases where Native women were raped in Indian country but taken to non-IHS hospitals, they were expected to pay for their own rape kits—which can cost between $700–$800.[33] This is a service that is usually provided free of charge for individuals who are part of a state investigation into sexual assault.

When evidence and investigation take a back seat to jurisdiction, it means that perpetrators are rarely arrested. In cases where a warrant is issued, often so much time has elapsed that perpetrators have fled.[34] In some cases, determining jurisdiction and collecting enough evidence for an arrest has caused law enforcement authorities to wait up to four years to arrest someone suspected of sexually assaulting a Native woman.[35]

As a result of Native advocacy around these disturbing trends, the federal government passed the Tribal Law and Order Act (TLOA) in 2010. This law was, among other things, designed to: increase intergovernmental communication by facilitating coordination between tribal, state and federal law enforcement bodies; prepare IHS facilities by developing uniform procedures and granting resources to manage sexual assault cases; and encourage accountability by tracking and publishing federal declination rates.[36]

The TLOA appears to have significantly lowered declination rates for sexual assault in Indian country.[37] However, while the TLOA signaled measured improvement in declination rates, they still remain disproportionately high. As Chapter Five will demonstrate, the TLOA legislated *over* the problem of jurisdictional conflicts without addressing the underlying issues that shape crime in Indian country. While the TLOA may have ameliorated some problems in the short term, it cannot dismantle the root problem in the long term, leaving us continuing to grapple with high rates of sexual assault against Native women.

Because of enduring problems with jurisdiction, often cases still do not result in arrests or referrals to state and/or federal governments. And even when jurisdiction can be determined, and enough evidence is collected for cases to be taken on by the federal government, attitudes and perceptions of Indian country also contribute to high declination rates. As former U.S. Attorney Margaret Chiara noted:

> I've had [assistant U.S. attorneys] look right at me and say, "I did not sign up for this" [...] they want to do big drug cases, white-collar crime and conspiracy. And I'll tell you, the vast majority of judges feel the same way. They will look at these Indian country cases and say, "what is this doing here? I could have stayed in state court if I wanted this stuff." [...] It's terrible indifference, which is dangerous because lives are involved.[38]

While the federal government colonized tribal jurisdiction under the rhetoric that Native people were incapable of managing serious crimes, today the United States often refuses to manage the duties it has appropriated. From a federal perspective, it appears that when crime in Indian country endangers white Americans sweeping legislation should be passed. However, when crime in Indian country affects Native women, it can be ignored in favor of what is seen as more important matters that primarily affect non-Native people. In other words, while crime in Indian country is too important to be left to Native people, it is not important enough to take resources away from white-collar crime. As federal prosecutors construct prosecuting sexual violence in Indian country as being inconsequential, they send the message that the lives and bodies of Native women are not valuable or worthy of protection. And, outside of the Native community itself, it appears that no one has heard this message louder than non-Native men.

Predatory Violence Against Native Women in the Wake of *Oliphant*

When traveling through Indian country, rather than falling under the jurisdiction of a sovereign by implied consent (such as when one crosses the border from one U.S. state to another, or travels from the U.S. to a foreign country), Indian country post-*Oliphant* is a space where the majority of non-Native people may enter a foreign sovereign, yet have no accountability to that sovereign. Jason O'Neal, the tribal police chief of the Chickasaw Nation, shows us what this reality looks like for tribal law enforcement in an interview with National Public Radio's Laura Sullivan. The interview takes place on Chickasaw land outside of a gas station convenience store:

Laura Sullivan:	Here's a guy walking into the store now. If he goes in there and he steals a carton of cigarettes, what happens to him?
Jason O'Neal:	If he's an Indian, he would go to jail.
LS:	If he is a non-Indian, what happens to him?
JO:	We would simply let him go and forward a report to the U.S. attorney.
LS:	And what happens to those reports?
JO:	Well, I really couldn't tell ya. I don't think I've ever been called back on one of them.[39]

Despite the fact that members of the federal government have recognized that "tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities,"[40] both state and federal governments continue to play competing roles in Indian country jurisdiction, creating a space in which law enforcement officers like O'Neal may be powerless to adjudicate crime committed by non-Native perpetrators. As one Native woman noted, because of this non-Native sexual predators have "targeted Indian country, reservations, rancherias and communities as the very best place to prey on Native women."[41]

In general, rape is an overwhelmingly intra-racial crime. For example, approximately 90% of Black women report being assaulted by a Black assailant and at least 70% of White women report being assaulted by a White assailant.[42] However, the Native community is the one glaring exception. For Native women, 86% of sexual assault is perpetrated by non-Native men, and four out of five Native survivors of sexual assault describe their attacker(s) as white.[43] This striking anomaly in sexual assault statistics does not exist in a vacuum. Rather, these statistics are dramatically shaped by the colonial context of jurisdiction in Indian country.

While all sexual assault is by nature violent, it does operate in different contexts. As discussed in Chapter One, the complicated system of jurisdictional authority in Indian country not only specifically privileges non-Native identity, but it also specifically marginalizes Native identity in cases of sexual violence. While jurisdiction over the sexual assault of *non*-Native women in Indian country defaults to the state, the involvement of a *Native* victim signals the interest of three separate sovereigns who may compete for jurisdiction—compromising the investigation of each—or decline to investigate, denying the Native survivor recourse for her assault.

As a result of the jurisdictional conflicts created by federal Indian policy, non-Native (overwhelmingly white) men become aware that their racial identity signals legal impunity, and in turn specifically seek out *Native* (as opposed to non-Native) women in *Indian country* as opposed to state land. One article in the *Native American Times* described sexual predators as viewing Indian country

as "feeding grounds,"[44] where white men "can do whatever they want."[45] Another blog states "if you want to rape [...] somebody and get away with it, do it on an Indian reservation."[46] Others have described Indian country as a "free-for-all,"[47] where "rapists are allowed to roam reservations, attacking women and young girls without real fear of being punished."[48] And as Deborah Blossom (Western Shoshone), acting director of the Great Basin Women's Coalition Against Violence stated, "Our women are open game. So many are violated and they tell us no one will do anything."[49]

The ease with which non-Native men may sexually violate Native women sends the message that the bodily integrity of Native women is not to be respected, that crime against Native women simply does not matter, and that Native women by their very racial and gender identities are inherently rapable. Viewing sexual violence through this predatory lens reveals that the disturbing rates of sexual assault against Native women today are in fact only contemporary manifestations of a colonial legacy hundreds of years in the making.

The Colonial Context of Sexual Violence: Constructing the Native "Other"

Sexual violence against Native women, while virtually unheard of prior to European contact, became an immediate reality in the first interactions between American Indians and Europeans.[50] Journal entries by early colonizers and letters from early settlers in the Americas detailed the ways that Native women were singled out for systematic rape.[51] Often, these assaults were characterized as collateral damage—that in the primary project of seizing Native land, European colonizers were also able to seize Native women. However, a more nuanced examination reveals that sexual violence against Native women was—and continues to be—central to the colonial experience.

As noted in Chapter Three, when Europeans first arrived in the Americas they confronted lands and resources that they were eager to make their own. At the same time, they also confronted Native peoples with distinct social, political and legal rights to these resources. Legal justifications thus quickly lent themselves as tools to legitimate the theft of the land and resources desired by European colonizers. However, just because something is legal, doesn't mean that it's moral.[52] For example, if murder were legal, most of us still wouldn't kill others because we recognize that other people share our humanity. Therefore appropriating Native land at the expense of Native people had to be naturalized through more than just law. It is in this context that ideological constructions of Native people emerged

as a corollary to moralize European conquest itself.[53] By portraying Native people as savage, barbaric, and sub-human, European colonizers were able to justify their legal actions.[54] As author Thomas Jimson notes:

> When you set about to dispossess a people of their land and source of livelihood, unless you have no conscious at all, one must find an excuse to safely hide from the truth of pain and suffering you are inflicting on innocent peoples [...] If, indeed, [Indians] were human beings [...] then they were in fact a lesser type of humanity who had no rights to life, land, or liberty.[55]

Jimson's passage demonstrates how ideology structured the legalization of what would otherwise be considered theft and murder. And, while these notions were levied against entire Native nations, they were highly gendered as narratives of conquest often focused on the perceptions of Native women.

At the same time that Europeans confronted Native communities with pre-existing rights to lands and resources, they also encountered Native women who were central political actors in the nations that governed these resources. And because many Native communities were matrilineal, women were often the ones who controlled and regulated the lands and resources that colonizers wanted.[56] Here, women's political and economic power threatened the primary goals of European colonization. Therefore, as Native activist Brenda Hill (Siksika Blackfeet) notes, "Attempts to destroy tribal sovereignty began with the destruction of women's sovereignty."[57]

As colonizers realized that divesting entire communities of their resources necessitated the disenfranchisement of Native women in particular, constructing the Native woman as a dangerous "Other" was a crucial tool of conquest. As political equals in their communities, Native women not only played central roles in civic life, but also made affirmative decisions about their bodies, gender expression, and sexuality. In contrast, Western Euro-patriarchy excluded women from the public sphere, and policed the bodies and sexuality of women.[58] As a result, European encounters with women who were not dominated by men became the foundation on which the subhuman status of Native women (and by extension entire Native communities) was built. In this context, European constructions of Native communities as savage were both gendered and sexualized, as many contact-era accounts indicate. For example in a 1525 letter to the Council of the Indies, Dominican Friar Tomas Ortiz remarked of Native people:

> They are more given to sodomy than any other nation. There is no justice among them. They go naked. They have no respect either for love or for virginity. They are stupid and silly. They have no respect for truth, save when it is to their advantage. They are unstable. They have no knowledge of what foresight means [...] They are incapable of learning.[59]

In this passage, Native communities were classified as having no justice, as unintelligent, and as sexually immoral. Such ideological constructions lent themselves to colonists eager to justify the appropriation of Native resources. If Native people had no justice, the logic went, they were by nature dangerous and violence against them became an act of self-defense. If they were unintelligent, then they were not able to manage their own resources, thus naturalizing European appropriation. If their bodies were not dominated by Christian morals, then they were available for domination by Western Europeans, which normalized gender violence against Native women. And indeed, from first contact, this mindset justified sexual violence against Native women, enslavement, and the appropriation of Native lands and natural resources.[60]

While Native people in general were seen as dangerous and sexually perverse, Native women were particularly vilified. Not only did Native women present a moral danger through perceived sexual perversion, but also their sexuality was presented as a physical danger to men. This is documented throughout the writings of Amerigo Vespucci, an Italian explorer, cartographer, and namesake of the Americas. From 1497 to 1504, Vespucci wrote a series of journal entries and letters regarding his alleged[61] voyages to the so-called New World. In one letter he described the unbridled lust of Native women as being so powerful that it led to the sterilization of men. Vespucci wrote, "[Native] women, being very libidinous" would engorge men's genitals to the point that they would "lose their virile organs and remain eunuchs."[62] Vespucci went on to illustrate that Native women's innate savagery and insatiable hunger for men drove them to literally consume European men. In a letter from his alleged third voyage, Vespucci recounted:

> [We] saw a [Native] woman come from the hill, carrying a great stick in her hand. When she came to where our Christian stood, she raised it, and gave him such a blow that he was felled to the ground. The other [Native] women immediately took him by the feet, and dragged him towards the hill [...] they all ran away towards the hill, where the women were still tearing the Christian to pieces. At a great fire they had made they roasted him before our eyes, showing us many pieces, and then eating them.[63]

Vespucci's piece communicates the savagery of Native communities as a whole through the cannibalistic appetite of Native women for European men. This narrative of consumption was highly sexualized throughout Vespucci's writings. In the same piece, he went on to portray Native women's desires as not only leading

to literal emasculation and consumption, but ultimately to the moral corruption of "Christian" (European) men:

> [Native men] marry as many wives as they please; and son cohabits with mother, brother with sister, male cousin with female, and any man with the first woman he meets.[64] [...] The women as I have said go about naked and are very libidinous, yet their bodies are comely; but they are as wild as can be imagined.[65] [...] When [Native women] had the opportunity of copulating with Christians, urged by excessive lust, they defiled and prostituted themselves.[66]

Vespucci's description of the perversion of Native people generally, is structured by the danger of Native women's sexuality specifically. The choice of Native women to "defile" and "prostitute" themselves, when framed through its impact on European men, shows that Native women not only posed a threat to men's physical bodies, but also to their Christian morals. In Vespucci's eyes, as Native women lusted after Christians, it threatened the morality of European men who may succumb to Native women's unrelenting sexual urges. And because Europeans perceived Native women as choosing to *embrace* this savage sexuality, they then became constructed as having no bodily integrity at all.

As Cherokee anti-violence activist Andrea Smith points out, prostitutes are rarely believed when they report that they have been raped.[67] This is because prostitutes are constructed as always inviting sex and therefore maintain no bodily integrity. Similarly, this construction of Native women as having no sexual mores appeared to invite sexual assault and naturalize rape by European colonizers. As Michele de Cuneo, an Italian nobleman on Columbus's second voyage wrote:

> While I was in the boat, I captured a very beautiful Carib woman, whom said Lord Admiral gave to me, and with whom, having taken her into my cabin, she being naked according to their custom, I conceived desire to take pleasure. I wanted to put my desire into execution but she did not want it and treated me with her finger nails in such a manner that I wished I had never begun. But seeing that, (to tell you the end of it all), I took a rope and thrashed her well, for which she raised such unheard of screams that you would not have believed your ears. Finally we came to an agreement in such manner that I can tell you she seemed to have been brought up in a school of harlots.[68]

In this passage, the very identity of this woman as Native played an active role in her rape. As a Native "Other" she was objectified and able to be "given" to the perpetrator. As it was her "custom" to be naked, and it was this nakedness that invited her rape, her very identity as a Native woman naturalized her sexual assault. Because she did not fit European gender roles and cultural norms, the

woman in this passage was constructed as having no bodily integrity and therefore her assault became justified in the eyes of her rapist. In fact, the author felt so vindicated by his actions he was able to conclude that despite her initial resistance, she ultimately enjoyed her violent assault.

Of course "enjoying rape" is a contradiction in terms, but the audacity of the author to frame his assault as such illustrates the extreme nature of colonial attitudes towards Native women. If Native women are seen as a threat to men, then violence against them becomes an act of self-defense. If Native women are constructed as lascivious, then all sexual activity is invited and ultimately enjoyed. And finally, if Native women appear to choose to live in bodies that are not yet subdued by patriarchy, then they are available to be dominated by European men.

Despite the notion of Native women "defiling" and "prostituting" themselves to European men while ultimately enjoying sexual assault, the reality is that Native women actively resisted rape. This was illustrated in the previous passage and is supported by many additional narratives. For example in 1552's *The Devastation of the Indies: A Brief Account,* Dominican Friar and Spanish historian Bartolomé De Las Casas recounted both the violence committed against Native women as well as the extent to which they were willing to resist it:

> One Spaniard took a maiden by force to commit the sin of the flesh with her, dragging her away from her mother, finally having to unsheathe his sword to cut off the woman's hands and when the damsel still resisted they stabbed her to death.[69]

This example, while tragic, shows the extent to which Native women resisted sexual violence.[70] And like the previous example, De Las Casas's account challenges the notion that Native women enjoyed or passively accepted sexual assault.

Over 200 years later, Franciscan Friar Junípero Serra recorded similar accounts as he presided over the missionary conquest of what would become the American state of California. During his tenure, he noted the rampant sexual assault of Native women by Spanish soldiers and attempted to intervene by documenting the attacks. One such document from 1773 reads:

> When both men and women at the sight of [Spanish soldiers] would take off running [...] the soldiers, adept as they are at lassoing cows and mules, would lasso Indian women who then became prey for their unbridled lust.[71]

Serra's advocacy ultimately made little difference in the lives of Native women who were terrorized by Spanish soldiers, as his dependence on them to police California Indian people outweighed his desire to end sexual violence.[72] Despite Serra's

ineffective campaign, his 1773 letter reveals a spirit of resistance as Native women actively engaged agency to avoid sexual assault.

Antonia Castañeda "Sexual Violence in the Politics and Policies of Conquest: Amerindian Women and the Spanish Conquest of Alta California" documents this and other forms of resistance throughout California's mission history in which Native women evaded sexual assault by fleeing, hiding, and campaigning against the missionary system in its entirety. For example, in 1785 a young Tongva spiritual leader named Toypurina was able to unite six disparate Native communities and organize an armed rebellion against the San Gabriel Mission. The rebellion centered on Native oppression under the missions as a whole, but was particularly inspired by the gendered persecution of Toypurina herself whose power as a cultural and political leader was seen as particularly threatening by Spanish colonizers.[73]

These passages not only show the prevalence of sexual assault during the early eras of colonization, but also the force with which Native women exerted agency against it. Yet, despite this clear tradition of resistance, colonial constructions of Native women continued to portray them as licentious and therefore lacking bodily integrity. As this next section will show, these initial perceptions of Native women have continued to impact their corporal sovereignty, as the trajectory of American colonial expansion continues to be structured by sexual violence.

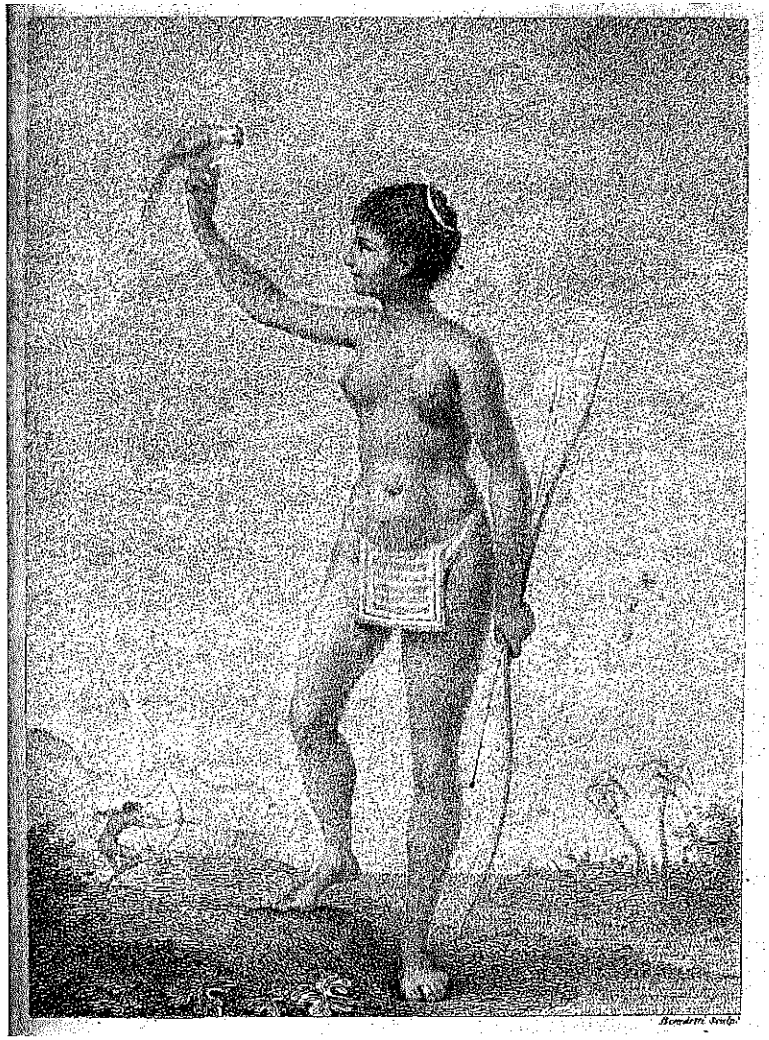

Figure 7. Indian Female of the Arrowauka Nation.

John Gabriel Stedman, *Narrative of a Five Years' Expedition*—1796

The Taíno of the Arawak Nation were among the first Indigenous people to encounter Columbus. John Gabriel Stedman's written accounts of Arawak women include numerous references to nudity and to a perceived lack of bodily shame. Michele de Cuneo's journal entry from Columbus's second voyage (discussed earlier in this chapter) demonstrates how these perceptions of Native women justified sexual assault in the eyes of European men. Courtesy of the California State Library- Sutro Branch, San Francisco, California.

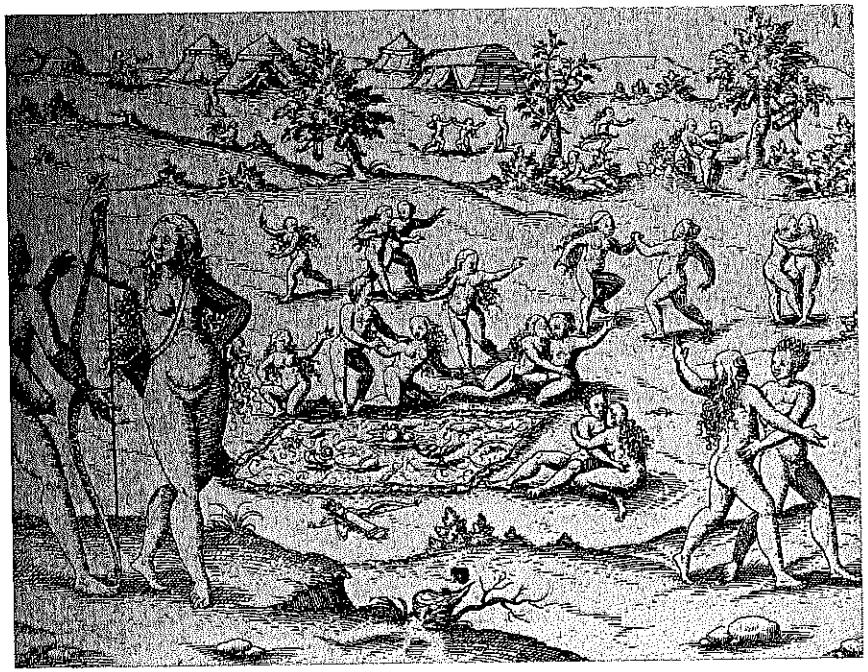

Figure 8. Engraving from Part Five.
Livinus Hulsius, *Collection of Voyages and Travels*—1599

(*Above*) This illustration from Livinus Hulsius' *Collection of Voyages and Travels* accompanies Sir Walter Raleigh's sixteenth-century account of the so-called New World. Here, a nude Native woman stands casually in the foreground. In the background, nude men and women are coupled in various stages of intimate encounters. The scene reflects European notions of Indigenous Americans as untamed and hypersexual. The perception that Native women willingly displayed their bodies, engaged in casual sexual relationships, and thus lacked sexual mores, contributed to the European assumption that they could then make no claims to bodily integrity. Courtesy of the John Carter Brown Library at Brown University.

(*Opposite*) *In The Four Continents* a bare-breasted, armed Native woman personifies America for a European audience. In her left arm she holds a human leg, severed at the thigh and ankle. In the background, Native people butcher a man and roast his leg on a spit—a common theme in contact era imagery used to communicate savagery and danger. A poem accompanying the image conveys America as a land of extraordinary wealth that is inhabited by a people of "barbarous rudenes [sic]." The author positions Christianity as a source of intervention where God's "Grace" will dress the nude barbarian and where the "Sunshine of Godds love [sic]" will cast out the "gloomy Shades of Death [sic]." © The Trustees of the British Museum.

Though to my Sisters long vnknowne I lay
I am as rich, and greater farr than they
My barbarous rudenes doth at full expresse
What Nature is, till we have Grace[s] dresse
But where the gloomy Shades of Death yet be
The Sunshine of Godds love I hope to see

Figure 9. America.
John Stafford, *The Four Continents*—1625–1635

Ille quidem nec Iris dudum non cognita terris,
Et Tu brevi auriferis late celeberrima venis,
Virgineis exlenta suis humanas recondens
Victa feralem prætendit AMERICA clavam.

Figure 10. America.

Adriaen Collaert after Maerten de Vos, *The Four Continents*—1588–89

(*Above*) Adriaen Collaert's sixteenth-century representation of America depicts an armed Native woman seated on an armadillo as a battle between Indigenous people and Europeans rages in the background. Behind her are Native people butchering a man and roasting his leg on a spit. The Latin inscription below the image refers to a land rich with gold but inhabited by a dangerous people. The Metropolitan Museum of Art, Gift of the Estate of James Hazen Hyde, 1959 www.metmuseum.org

(*Opposite*) Volume XI of *Atlas Maior* includes some of the earliest and most complete maps of the Americas. Opening the volume is this illustration of an armed Native woman standing on the decapitated, arrow-pierced head of a European man. In the background, Native men toil in a silver mine and present the precious metal at her feet. To Europeans, America represented both the promise of riches and the danger of Native women who controlled them. *Volume XI: America*, Tracy W. McGregor Library of American History, Albert and Shirley Small Special Collections Library, University of Virginia.

Figure 11. America.

Joan Blaeu, *Atlas Maior*—1665

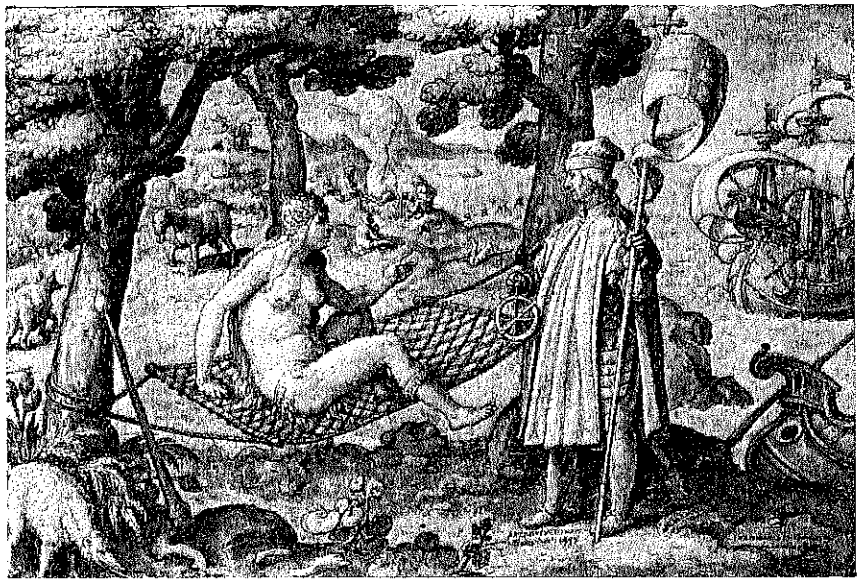

Figure 12. Discovery of America: Vespucci Landing in America.
Jan van der Straet (called Stradanus)—1587–89

(*Above*) Figure twelve depicts Amerigo Vespucci's so-called discovery[74] of America. The word "ACIREMA" in backwards letters bridges the Atlantic Ocean to what would become the United States. Here, Vespucci confronts a Native woman who represents both the promise and the danger of the New World. Though relaxing on a hammock, she has a club nearby and is surrounded by wild animals. In the distance, Native people roast a human leg on a spit. The Metropolitan Museum of Art, Gift of the Estate of James Hazen Hyde, 1959 www.metmuseum.org

(*Opposite*) Part Eleven of Theodor de Bry's *Indiae Orientalis* compiles Amerigo Vespucci's letters from his 1501 and 1503 voyages to America. The engraving illustrates a scene discussed earlier in this chapter in which Vespucci recalls Native women capturing European men, butchering their bodies, and publically consuming their flesh. Though the background of the image clearly portrays conflict between Native people and Europeans as a whole, the violence perpetrated by Native women against European men is at the forefront of Vespucci's narrative and de Bry's corresponding illustration. Courtesy of the John Carter Brown Library at Brown University.

PARS UNDECIMA ORIENTALIS.

I.

Quid Americo Veſputio, ejúſque comitibus, in India orientali inter Barbaros evenerit.

Americus Veſputius ad quandam India Orientalis inſulam delatus, omni ope familiaritatem cum nudis incolis contrahere conatus eſt: cum vero plane agreſtes, nullaq; ratione ad humaniorem mentem inflecti poſſent, naves rurſum conſcendit, relictis in littore nolis, ſpeculâ, aliisq; ad genus crepundiis, ad quæ contemplanda ſtatim mulierum barbararum confluxit agmen. Interea Veſputius venuſtæ facie adoleſcentem, quiſti mulierum turbæ ſeſe immiſceret, delegat. Hunc fœminæ undique prenſantes, habitum ejus non parum mirate circumſiſtunt. Tandem una è turba accedens, fuſtem tanta vi capiti Adoleſcentis impingit, ut mortuus in terram corruerit: ſtatim reliquæ cum in collem vicinum protrahunt, veſtibus exutum macſant, torrent, atque in Luſitanorum conſpectu devorant. Verùm cum magno impetu Luſitani invadunt, qui metu exterriti, armorum plane immemores, fugam capeſſunt, cumque minori ſcaphâ, quæ ſubinde adhærebat, tam ſubitò ad majorem navem ſe recipere non poſſent, non parum a Barbaris iſtis damni acceperunt: donec periculo in majoribus navibus cognito, quatuor tormenta, abſque ullo tamen damno, in Barbaros evibrarunt: quorum fragore & crepitu attoniti in fugam ſeſe conjecerunt.

a 3 Quomo-

Figure 13. Engraving from Part Eleven.
Theodor de Bry, *Indiae Orientalis*—1619

The Colonial Context of Sexual Violence: Gendering the Body, Gendering the Land

The social construction of Native women as sexually promiscuous and therefore sexually violable helps to contextualize the widespread rape of Native women within the larger project of colonization. As Europeans and later Euro-Americans conceptualized the "New World," it was envisioned in very gendered and sexualized terms. Through colonists' eyes, Native land was "virgin," "bountiful," "unbridled," "untamed," and "free for the taking."[75] Not coincidentally, the Indigenous female bodies on this land were imbued with the same sexualized discourse. Here, under Euro-American colonization, the construction of Native women as having no *corporal* sovereignty over their own bodies became fused with attitudes towards Native people as having no *political* sovereignty over their own land.

In Kirkpatrick Sale's *Conquest of Paradise: Christopher Columbus and the Columbian Legacy,* the author demonstrates the ways that the colonization of the Americas was seen largely in gendered terms as perceptions of Native land went hand-in-hand with perceptions of Native women's bodies. Sale notes that America became "the succulent maiden to be seduced, deflowered, and plundered by a virile Europe [...]"[76] Here, the technological prowess of Europe was substituted for male sexual prowess as the rape of Indian land became the rape of Indian women. Sale goes on to argue:

> [T]he masculine attitude toward the feminine, the acquisitive toward the desired, the dominant toward the weak, the civilized toward the natural: the women of America were as much a part of the bounty due the conquering Europeans as the other resources in which it luxuriated [...] attitudes toward sex and women [were] every bit as exploitative and instrumental as those toward nature: Mother Earth and earth mother were all one, and all to be used.[77]

As the author indicates, conflating Native land with Native sexuality was central to colonization, as the conquest of Native land was structured by the conquest of Native women.[78] As bodies became objects analogous to what was to be consumed, Native land—like Native women—became something to be conquered, domesticated and subdued by Euro-American men.

After the formation of the United States, European attitudes towards land became increasingly entrenched in federal Indian law. Perhaps the most significant example of this is the 1823 U.S. Supreme Court decision in *Johnson v. M'Intosh* where the court ruled that private citizens could not purchase land directly from Native people.[79] Chief Justice John Marshall who delivered the majority opinion in the case supported the ruling by arguing that Native nations did not have

complete legal authority over their own land because they had failed to privatize it.[80] After *Johnson,* Native people were henceforth considered merely "occupants" of lands that they wandered over but never actually owned.[81] By contrast, through the capacity to dominate the earth through extraction and privatization, Europeans (and later Euro-Americans who inherited the land after American independence) became the rightful "owners" of American land.

Under *Johnson,* Native people's rights to their land were minimized because of their failure to dominate it. Similarly, the logic of sexual violence is itself structured from these European perceptions of land and political sovereignty. Under Euro-American colonization, Native women were seen as having no bodily integrity and a savage sexuality that appeared to invite rape. As bodies were constructed as analogous to land that had yet to be dominated and was therefore for the taking, Native women were constructed as simply occupants of a body that was destined to be dominated by European power.[82] Because Native sexuality, like Native land, was "free" and "unbridled," it was not for Native women to control. Instead Native women's bodies became something that should be subdued at the hands of Euro-American men. Like land, ownership of Native bodies could only come from patriarchal domination and the inscription of violence.[83]

While the conflation of land and bodies may appear to portray sexual violence against Native women merely as an aspect of colonization, Native scholar Andrea Smith illustrates that instead it is central to it.[84] In *Conquest*, Smith cites Paula Gunn Allen to argue:

> [C]olonizers realized that in order to subjugate indigenous nations they would have to subjugate women within these nations. Native peoples needed to learn the value of hierarchy, the role of physical abuse in maintaining that hierarchy, and the importance of women remaining submissive to their men.[85]

Smith goes on to note, "Thus in order to colonize a people whose society was not hierarchical, colonizers must first naturalize hierarchy through instituting patriarchy."[86]

As Smith and Allen argue, in order for Euro-Americans to successfully colonize Native resources, they had to successfully subjugate Native women. Sexual violence against Native women thus became a tool with which to inscribe hierarchies on non-hierarchical peoples in order to control communities as a whole.

Sale, Smith, and Allen's analyses indicate the way that the early conflation of Native sexuality, Native bodies, and Native resources informed the colonial process. As Euro-American hegemony expanded, it continued to signal widespread sexual violence against Native women as rape became incorporated into colonial law and policy. Spanish Dominican Bartolomé De Las Casas, for example,

described how the wives of male Native leaders were strategically raped as a method to control entire Native communities.[87] Later, the Doolittle Report of 1867 issued by the U.S. federal government detailed the ways in which sexual violence against Native women was integrated as a weapon of war in the military conquest of Native peoples.[88]

Violence against Native women was in fact so extreme that Native women were not just sexually assaulted, but murdered and then mutilated. The federal government's own reports reveal that after the Camp Grant massacre of 1871, Native women were found "lying in such a position, and from the appearance of their genital organs and of their wounds, there can be no doubt that they were first ravished and then shot dead."[89] And after the Sand Creek Massacre of 1864, Lieutenant James Connor remarked that he "heard of numerous instances in which men had cut out the private parts of [slain Native women] and stretched them over their saddle-bows and wore them over their hats while riding in the ranks."[90]

As these examples show, Native women were not only raped and murdered, but their sexual organs literally became objects that were appropriated by white men as symbols of conquest. And as the federal government waged war against American Indians in westward expansion, large-scale violence against Native women became incorporated as an active strategy. For example, prior to ascending to the presidency, then General Andrew Jackson waged war against Native nations in the American South to free up land for the Southern plantation economy. As part of his military strategy, he is said to have instructed his troops to specifically kill women and children to "complete" the "extermination."[91] Similarly, as Colonel John Chivington prepared to invade Cheyenne and Arapaho land to protect the interests of white settlers during the Indian Wars, he advised his troops to specifically kill Native women and children because "nits make lice."[92]

Both Jackson and Chivington's statements illustrate the gendered aspects of colonization that identify Native women as the ultimate threat to the settler-state. As the colonization of the Americas has primarily been about the appropriation of Native resources and the expansion of Euro-American cultural hegemony, those who have stood in the way of this project were considered problematic and polluting to the body politic.[93] As the bearers of future generations who would continue to make claims over the economic resources of the Americas, Native women's fertility posed a constant threat.[94] Therefore solving the "Indian problem" necessitated targeting Native women and their ability to reproduce.[95]

In *Conquest*, Andrea Smith illustrates that reproductive violence against Native women is still part and parcel to federal Indian policy today. Her work shows the way that Native women's fertility has been targeted through environmental racism, forced/coerced sterilization and adoption, and medical testing of dangerous drugs.

Here, Smith shows how Indian Health Service policies sanctioned the widespread surgical sterilization of Native women without informed consent and also limited Native women's fertility by experimenting with dangerous contraceptives like Norplant and Depo-Provera.[96] Smith's research confirms my personal experience as a Case Worker for the Washoe Tribe in which I encountered clients who had been forced or coerced into medical procedures that rendered them sterile, as well as with my experience at Sacred Circle's *Women are Sacred* conference, in which Native women shared their stories of forced adoption. Andrea Smith also builds on existing environmental racism research to note that the colonization of Native land with toxic debris simultaneously colonizes Native women's bodies and reproductive organs.[97] As Smith and others show, when radioactive waste sterilizes Native women and/or causes debilitating birth defects and stillborn babies, the colonization of the land *is literally* the colonization of Native women's bodies.

Conclusion: Jurisdiction as Sexual Violence

As a settler-state, the United States—by definition—can only exist through the consumption of Native lands and resources. As such, the existence of Native people with rights to those lands and resources is an existential threat. As this chapter shows, "solving" the "problem" of Native political autonomy directed colonial violence towards Native women in particular. Here, the nation-state has attempted to disempower entire communities *politically* by attacking women *corporally*.

Nez Perce/Tejana scholar Inés Hernández-Avila tells us, "It is *because* of a Native American woman's sex that she is hunted down and slaughtered, in fact, singled out because she has the potential through childbirth to insure the continuance of the people"[98] (emphasis in original). Through their ability to reproduce, Native women may usher into the world successive generations of Native people who will continue to threaten the legitimacy of the settler-state. As such, the nation-state has consistently hunted down Native women to be demoralized, dismembered and disappeared.

Today, Native women continue to be singled out and, in fact, hunted down by non-Native men in the colonial space that is Indian country.[99] Today when white men target Native women for sexual violence in Indian country, this is both an individual action of sexual violence, as well as a larger, societal act of colonial violence. As individual men learn of their privileged racial statuses and use this privilege to specifically target and inscribe sexual violence on Native women, it becomes impossible to separate the individual predator from the predatory society that has preyed upon Native women since contact.

Euro-American colonization was made possible through legal violence that codified Native people as barbaric and incapable of maintaining control over their own lands and resources. As part of this process, in an attempt to "solve" the "Indian problem," federal Indian policy created modern jurisdictional conflicts. The Major Crimes Act, the Dawes Act, Public Law 280, and *Oliphant v. Suquamish Indian Tribe* are all acts of legal violence marked by investments in American hegemony and legitimated through the construction of Native people as savage and backwards. Similarly, the creation of Indian country and the establishment of a nation-state that may create such policies could not have occurred without violence against Native women. "Indian country" itself was forged from legal violence and warfare, both of which were structured by the logic of sexual violence as a tool to disempower entire communities. And it is in these spaces—created from the construction of Native women as savage and therefore rapable—in which they are again violated with impunity. Therefore, when a white man targets Native women for sexual violence in these spaces, he does so with the force of 500 years of colonial history.

In this way, we must see jurisdictional impunity in the prosecution of sexual violence against Native women not simply as the unintended consequence of a complex but necessary legal structure, but instead as a colonial phenomenon that actively *maintains* and *inscribes* colonial violence on the bodies of Native women. As such, addressing American jurisdiction and the sexual violence that characterizes it requires us to call Euro-American colonization itself into question. As jurisdictional conflicts and sexual violence continue to plague Indian country, Native women, Native communities, non-Native organizations and the U.S. federal government are crafting solutions. Based on our understanding of the way that sexual, legal, and colonial violence operate within jurisdictional schema in Indian country, the remainder of this book turns its attention to evaluating solutions in an attempt to contribute to the anti-violence movement in Indian country.

Notes

1. Andy Ternay, "How to Rape a Woman and Get Away With It." *Native American Net Roots.* Web. 21 Jul. 2008 <www.nativeamerican netroots.net/diary/130/> Accessed 12 Apr. 2011.
2. Deer, "Sovereignty of the Soul" 458.
3. Ibid.
4. Pevar, *Rights of Indians and Tribes* 119. There are some exceptions to this which are discussed in Figures 1–6 and their footnotes.
5. Meisner, "Modern Problems."
6. Major Crimes Act 18 U.S.C. § 1153 (1885).
7. Pevar, *The Rights of Indians and Tribes* 149.

8. Deer and Garrow, *Tribal Criminal Law* 87–93.
9. Perry, *Policing Race* 42–45.
10. Ibid., 43.
11. Ibid.
12. Ibid., 42–45.
13. Sullivan, "Legal Hurdles Stall Rape Cases."
14. Interview with an assistant U.S. attorney (identity withheld), quoted from Amnesty International, *Maze* 34. This is substantiated by reports from the *Native American Times* stating "In Oklahoma it can take weeks or even months to determine jurisdiction." ("US Authorities Fail to Protect Native American and Alaska Native Women from Shocking Rates of Rape, Reports Amnesty International," *Native American Times* 27 Apr. 2007: 1–2).
15. Interview with support worker May 2005. As quoted in Amnesty International, *Maze* 27.
16. Deer and Garrow, *Tribal Criminal Law* 87–93.
17. Ibid.
18. Hallie Bongar White et al., "2008 Final Report: Creative Civil Remedies Against Non-Indian Offenders in Indian Country," *Southwest Center for Law and Policy* (Tucson: 2008) 14.
19. Pevar, *The Rights of Indians and Tribes* 18.
20. Hallie Bongar White et al., "Final Report" 7.
21. All charts generated from data in Garrow and Deer's *Tribal Criminal Law and Procedure*, 93–94 and S. 47: Violence Against Women Reauthorization Act of 2013.
22. See Figure 6 for exceptions. U.S. military jurisdiction may also act as a fourth sovereign (as in the case of *Elk v. U.S.*).
23. There are some exceptions to this when the federal government shares jurisdiction with the state for certain crimes (e.g., hate crimes committed exclusively on state land that also violate federal civil rights laws). In that case, the state and the federal government would have concurrent jurisdiction as separate sovereigns and double jeopardy would not attach. As noted in Figure 1, U.S. military jurisdiction may also play a role for certain crimes.
24. Lujan and Adams, "US Colonization of Indian Justice" 12.
25. Ibid.
26. White et al., "Final Report" 8.
27. For example: between 1997 and 2006, the declination rate for federal crimes originating in Indian country was twice the rate of federally prosecuted crime in general; and in 2006, of the approximately 5,900 aggravated assaults referred to federal prosecutors only about 4% were prosecuted. See: Michael Riley, "Promises, Justice Broken: A Dysfunctional System Lets Serious Reservation Crimes Go Unpunished and Puts Indians at Risk," *Denver Post.* 11 Nov. 2007.
28. Amnesty International, *Maze* 62.
29. Ibid., 63.
30. Ibid., 27–28.
31. The passage of the Tribal Law and Order Act of 2010 implements sexual assault protocols in Indian Health Service hospitals. Pub L. No 111-211.
32. Amnesty International, *Maze* 58–59.

33. Amnesty International, *Maze.*
34. Ibid.
35. As Navajo Police Chief Jim Benally stated: "In the Navajo Nation, because violent crimes are investigated by FBI and prosecuted by US attorneys it can take up to 2–4 years for an arrest to be made." From Amnesty International *Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA: One Year Update* (New York: Amnesty International Publications, 2008) 6.
36. Tribal Law and Order Act. Pub L. No 111-211. 29 Jul. 2010.
37. For example, recent Department of Justice reports show that declination rates for Indian country criminal cases rates have declined from about 50% to between 31% and 36% in the years since the signing of the TLOA. See United States Department of Justice, "Indian Country Investigations and Prosecutions." 2011–2012 and 2013.
38. Riley, "Promises, Justice Broken."
39. Sullivan, "Legal Hurdles Stall Rape Cases."
40. Janet Reno, "A Federal Commitment to Tribal Justice Systems," (79 Judicature 1995) 113–114.
41. Gray, "Protecting Indian Women" 8.
42. See USDOJ statistics as quoted in Amnesty International, *Maze* 4–5; and Steven Perry, "Measuring Crime and Justice in Indian Country," *Bureau of Justice Statistics*: 9–10, 18.
43. Ibid.
44. Gray, "Protecting Indian Women."
45. Quoting Chickasaw Tribal Police Chief Jason O'Neal in Sullivan, "Legal Hurdles Stall Rape Cases."
46. Wetzelbill, "I Was Witness to One on My Reservation," Comment on One in Three Native American Women Will Be Raped in Her Lifetime, 2007.
47. Sullivan, "Lawmakers Move to Curb Rape."
48. Chuck Cook, "Rape with Impunity: Police Shrug at 'Non-Emergency' Crime," *Indian Country Today* 70.20 (1987): 7.
49. Norrell, "Native Women Are Prey."
50. Mihesuah, *Indigenous American Women.*
51. See for example Bartolomé De Las Casas, *The Devastation of the Indies: A Brief Account* (Baltimore: The Johns Hopkins University Press) 1992. Originally published in 1542; and letters from Columbus's first and second voyages (1492–1496) published in John Cohen, *The Four Voyages of Christopher Columbus* (New York: Penguin, 1969).
52. As Martin Luther King Jr. reminded us in his letter from Birmingham jail as he sat incarcerated for protesting against civil rights violations of Black Americans, "We should never forget that everything Adolf Hitler did in Germany was 'legal.'" See Jonathan Rieder, *Gospel of Freedom: Martin Luther King Jr.'s Letter from Birmingham Jail and the Struggle that Changed a Nation* (New York: Bloomsbury Press, 2013) 68.
53. Mihesuah, *Indigenous American Women* 58–59.
54. Agtuca, "Beloved Women" 8.
55. Thomas Jimson, *Reflections on Manifest Destiny and Race.* Center for World Indigenous Studies, 1992.
56. Smith, *Conquest* 18.

57. Hill, "The Role of Advocates" 194.
58. See Mihesuah, "Colonialism and Disempowerment" in *Indigenous American Women.*
59. As quoted in Stannard, *American Holocaust* 217.
60. See generally, Howard Zinn *The People's History of the United States* (New York: HarperCollins, 2003); Smith, *Conquest*; and Kirkpatrick Sale, *Christopher Columbus and The Conquest of Paradise* (New York: Alfred Knopf, 1990).
61. In the introduction to *The Letters of Amerigo Vespucci*, translator Clements R. Markham discusses whether or not Vespucci actually made the journeys that he describes in his written accounts. Markham notes that many scholars (both contemporaries of Vespucci as well as modern historians) agree that some of Vespucci's letters were fabricated. For the purposes of this research, the veracity of Vespucci's accounts is somewhat moot. While his actual experiences may be questioned, there is no doubt that Vespucci's writing did significantly impact European/Euro-American attitudes towards the so-called New World. Since my discussion focuses on European/Euro-American *perceptions* of Native people, Vespucci's writing (fabricated or not) is therefore relevant. See Clements R. Markham trans. *The Letters of Amerigo Vespucci and Other Documents Illustrative of His Career* (New York: Burt Franklin, 2011).
62. Amerigo Vespucci, "Letter on his Third Voyage from Amerigo Vespucci to Lorenzo Pietro Francesco Di Medici" March (or April) 1503. From Markham *The Letters of Amerigo Vespucci.*
63. Vespucci, "Third Voyage of Amerigo Vespucci." From Markham *The Letters of Amerigo Vespucci.*
64. Vespucci as quoted in Kirkpatrick Sale, *Christopher Columbus and the Conquest of Paradise* (New York: Alfred Knopf, 1990) 141.
65. Vespucci, "Third Voyage of Amerigo Vespucci." From Markham *The Letters of Amerigo Vespucci* (alternative translation from Sale).
66. Vespucci as quoted in Sale, *Conquest of Paradise* 141.
67. Smith, *Conquest* 10.
68. As quoted in Stannard, *American Holocaust* 84.
69. De Las Casas, *Devastation* 77.
70. It is important to note that resistance to sexual assault can take many forms. Resistance does not have to involve a physical fight, or resisting to the point of death in order to be legitimate. All forms of resistance are important and valid.
71. Notes written by Junipero Serra circa 1773. Quoted in Antonia Castañeda, "Sexual Violence in the Politics and Policies of Conquest: Amerindian Women and the Spanish Conquest of Alta California," *Building With Our Hands: New Directions in Chicana Studies*, eds. Adela De La Torre and Beatriz M. Pesquera (Berkeley: University of California Press, 1993) 15.
72. Antonia Castañeda, "Sexual Violence in the Politics and Policies of Conquest."
73. Louis V. Jeffredo-Warden, "Perceiving, Experiencing, and Expressing the Sacred: An Indigenous Southern Californian View," *Over the Edge: Remapping the American West*, eds. Valerie J. Matsumoto and Blake Allmendinger (London: University of California Press, 1999) 330.
74. Though Columbus is credited with making first European contact with the so-called New World, it is Vespucci who is alleged to have made first landfall on what would become the

United States. Vespucci's first name (Latin: Americus) is the namesake of America. Ironically, the account of Vespucci's first voyage pictured above is likely a fabrication.

75. Deer, "Sovereignty of the Soul" 459; C. Richard King, "De/Scribing Squ*w: Indigenous Women and Imperial Idioms in the United States," *American Indian Culture and Research Journal*, UCLA American Indian Studies Center. 27.2 (2003): 6; Sale, *Conquest of Paradise* 141, 258; Albert Hurtado, "When Strangers Met: Sex and Gender on Three Frontiers," *Frontiers* 17.2 (1996): 57–59.
76. Sale, *Conquest of Paradise* 258.
77. Ibid., 141.
78. Perry, *Policing Race and Place* 33–34.
79. *Johnson v. M'Intosh* was the first of three U.S. Supreme Court cases known as "The Marshall Trilogy," which laid the foundation for modern federal Indian policy.
80. Barker, "For Whom Sovereignty Matters" *Sovereignty Matters:* 7–9.
81. Ibid.
82. Francis Jennings, "Virgin Land and Savage People," *American Quarterly* 23.4 (1971): 520–521.
83. Ibid.
84. Andrea Smith, "Not an Indian Tradition: The Sexual Colonization of Native Peoples," *Hypatia* 18.2 (Spring 2003): 70.
85. Quoting Paula Gunn Allen in Smith, *Conquest* 23.
86. Ibid.
87. De Las Casas, *Devastation of the Indies* 37.
88. *Condition of the Indian Tribes.* Report of the Joint Special Committee (Washington, D.C.: Government Printing Office, 1867). Commonly referred to as the "Doolittle Report" of 1867 for Senator James R. Doolittle, chair of the committee who prepared the report.
89. *Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* (Washington, D.C.: Government Printing Office 1872) 72.
90. Ibid., 57.
91. Gale Toensing, "Indian-Killer Andrew Jackson Deserves Top Spot on List of Worst U.S. Presidents." *Indian Country Today Media Network.* 2012.
92. Ibid., 71.
93. Anne Waters, "Introduction: Indigenous Women in the Americas," *Hypatia* 18.2 (2003): xviii.
94. Smith, *Conquest.*
95. See generally: Smith, *Conquest*; Deer, "Sovereignty of the Soul"; Mihesuah, *Indigenous American Women*; Waters, "Introduction"; and Weaver, "The Colonial Context."
96. Smith, *Conquest* 79–108.
97. Ibid., 109–118.
98. Inés Hernández-Avila, "In Praise of Insubordination, Or, What Makes a Good Woman Go Bad?," *Chicana Cultural Studies Reader*, ed. Angie Chabram-Dernersesian (New York: Routledge, 2006) 198.
99. Gray, "Protecting Indian Women."

CHAPTER FIVE

Examining the Federal Response to Jurisdictional Conflicts in Indian Country: The Tribal Law and Order Act of 2010

> I know that too often, this community has heard grand promises from Washington that turned out to be little more than empty words. And I pledged to you then that if you gave me a chance, this time it would be different.
>
> —PRESIDENT BARACK OBAMA AT THE SIGNING OF THE TRIBAL LAW AND ORDER ACT[1]

On May 15, 1994, Lisa Marie Iyotte (Lakota) was brutally beaten and raped on the Rosebud Indian Reservation. She went to an Indian Health Services hospital to receive treatment for her injuries, but no doctors talked to her about her rape. Federal authorities did not interview her. Ms. Iyotte wanted to pursue her case, but federal attorneys declined to prosecute it. The man who attacked her went on to assault another woman and rape a teenage girl before he was finally arrested. He was never charged for the assault and rape of Ms. Iyotte.[2]

Sixteen years later, Lisa Iyotte found herself at the White House sharing her story in front of a national audience. In a devastating speech, Ms. Iyotte described the way that she was systematically denied justice in a society that let her case "fall through the cracks."[3] However, she remained hopeful that future legislation could help women like her find justice. As Ms. Iyotte concluded her speech, she introduced President Barack Obama who proceeded to sign the Tribal Law and Order Act of 2010 into law. At the signing, President Obama recognized the epidemic of sexual violence against Native women in Indian country stating, "when one in

three Native American women will be raped in their lifetimes, that is an assault on our national conscience; it is an affront to our shared humanity; it is something that we cannot allow to continue," and that despite a history of empty promises from the federal government, "this time it would be different."[4]

The Tribal Law and Order Act of 2010 (TLOA) is the result of advocacy from both Native and non-Native community organizations and individuals, as well as media attention from organizations like Amnesty International.[5] Hailed as an astounding victory by many,[6] the TLOA is the first comprehensive bill aimed at addressing jurisdictional conflicts in Indian country with a focus on addressing sexual violence against Native women. While most non-Native sources applaud the TLOA as "a huge victory for human rights,"[7] some in the Native community are reserved in their celebration of this new law. Highlighting the apparent contradiction of using federal Indian law to fix a problem created by federal Indian policy, many Native women problematize the Act. While the TLOA is variably supported and opposed by those in the Native community, many Native women conceptualize the TLOA as an important "step in the right direction" that will take continued advocacy to perfect. This chapter examines the ways that the TLOA addresses jurisdictional conflicts in Indian country as well as the way it is conceptualized by the Native community. In doing so, I measure the TLOA against a master narrative of federal Indian policy in order to discuss if—as President Obama promised—this time it will indeed be different.

Framing the Problem, Framing Solutions

This research demonstrates that jurisdictional conflicts are part of a master narrative of federal Indian policy characterized by divestments in Native sovereignty and investments in American hegemony. Here, even when trying to solve perceived issues in Indian country, the federal government often exacerbates problems for Native people by continuing to colonize Native justice systems. Public Law 280 is just one of many examples demonstrating that when legislation to address law and order in Indian country is done in a way that divests in tribal sovereignty, it may exacerbate the problem it is trying to solve, creating even more problems in Native communities. Keen attention to the TLOA is therefore vital as it can indicate if the federal government has broken with its tradition of compounding problems in Indian country. By measuring the TLOA against the backdrop of federal Indian policy that I have developed, while incorporating the perspectives of Native women and Native communities, we can begin to contemplate the possibility of legislating a solution to jurisdictional conflicts and sexual violence in Indian country in a way that both invests in and enfranchises Native communities. To do this, I examine the way that the TLOA frames problems and solutions to sexual violence in Indian country, as well as its efficacy as articulated by Native women and nations.

Though jurisdictional conflicts have been operating in the lives of Native people in Indian country for over a century, the extreme nature of this problem has only recently reached larger audiences. Though Native people have been lobbying members of Congress for decades to draft legislation to address this issue, it wasn't until the Amnesty International report *Maze of Injustice* was released in 2007 that lawmakers crafted such legislation in the form of the TLOA. In creating *Maze*, Amnesty International—a non-Native human rights organization—worked actively with Native women and Native community organizations to draft a Native-centered report. From this initial collaborative project, media outlets like National Public Radio, *The Denver Post*, and Current TV began publishing information on sexual violence against Native women in Indian country.[8] Increased awareness of the issue outside of Native communities helped pressure Congress to take action, and on July 29, 2010, the TLOA was signed into law.

Major findings identified in the Act include: rates of sexual violence against women are extremely high in Indian country; jurisdictional conflicts negatively impact public safety in Indian country, and these conflicts have been exploited by criminals; and tribal justice systems are "often the most appropriate institutions for maintaining law and order in Indian country."[9] To address these findings, the major goals of the TLOA are to: increase coordination between federal, state and tribal entities; empower tribal governments; and reduce the prevalence of sexual violence against Native women.[10]

In order to achieve these goals, the Act takes several approaches: grant making to tribal governments; information sharing between tribal, state and federal entities; implementing standardized procedures for data and evidence collection; creating new federal liaison positions; and increasing tribal sentencing authority.[11] The TLOA makes large grants available for Native nations to enhance their tribal justice systems by providing funding for the hiring and training of new police officers, the purchase of new equipment such as computers, weapons and vehicles, and the construction of detention facilities. To facilitate information sharing, the TLOA establishes a program where Native nations may gain access to national crime databases. Additionally, the TLOA requires the Department of Justice to publish declination rates for crimes originating in Indian country and improves the collection of reservation crime data in general. The TLOA implements standardized procedures in Indian Health Service facilities to respond to sexual assault cases and also requires specialized "family violence" training for law enforcement

officers and prosecutors to better work with Native survivors. The TLOA also establishes the Office of Tribal Justice and creates several new federal positions and committees that work to facilitate communication between the federal, state and tribal governments when handling cases that originate in Indian country. Furthermore, the TLOA allows Native nations in PL 280 states to call on the federal government when state governments do not adequately address crimes that originate in Indian country. And finally, the TLOA expands tribal sentencing authority to up to three years in jail and up to a $15,000 fine for any single offense (up from one year and $5,000 since the Indian Civil Rights Act was amended in 1986).[12]

The TLOA represents an important point of departure from the dominant narrative of federal Indian policy. Breaking from its decidedly non-democratic tradition of excluding Native people from creating the legislation that would then control their lives, members of Congress actively worked with Native leaders to craft the TLOA. Representative Herseth Sandlin from South Dakota and Senator Byron Dorgan from North Dakota convened several Senate committee meetings to hear from Native representatives about how they conceptualized problems and solutions to jurisdictional conflicts and sexual violence against Native women in Indian country.[13] Unlike the vast majority of federal Indian policy, the TLOA marks a distinct shift in that it begins to incorporate Native voices into the legislation that directly affects Native communities. This Native-centered shift in thinking is further indicated by the Act itself that requires many federal agencies to act "in consultation" with Native nations when making decisions about law enforcement in Indian country.[14]

While this may represent an important break from earlier federal policy, we must problematize the way that Native people were variously included and excluded from this process. While consultation with Native people marks an improvement from a tradition of deciding what is best for Native people without asking them, the Act fails at truly giving agency to Native communities themselves. Despite the TLOA's insistence that its goal is to "empower tribal governments [...] to safely and effectively provide public safety in Indian country,"[15] the federal government still had the final say in the authorship of this Act. The TLOA was written by non-Native legislators and was passed in a Congress with only one member who is enrolled in a Native nation.[16] While perhaps more familiar with the needs of Native nations through consulting certain Native leaders, Native communities did not shape this legislation in a way that truly reflects tribal sovereignty. As *Indian Country Today* recognized, "Much of the impact of the TLOA will be lost in bureaucratic regulations and administration if tribal communities and leaders do not have significant voice in the planning and organization of justice programs."[17] Whereas the TLOA offers mere consultation with a handful of Native leaders, a true method to empower tribal communities could have included joint or co-authorship of the bill by members of Native nations selected by the communities themselves.

Concern over complicated bureaucracy is frequently expressed in the Native community regarding the TLOA. One of the cornerstones of the TLOA is increased collection of reservation crime statistics as well as the publication of federal declination reports for crimes that originate in Indian country. While these statistics have been much sought after by Native women and Native communities who want to leverage them to draw attention to the problem of sexual violence against Native women, if the compilation of these statistics is not coupled with attention to the issues that produce sexual violence against Native women, this approach will do little to create meaningful change. As Carrie Garrow, Chief Judge of the St. Regis Mohawk Tribe noted, "Endless bureaucracy and more data collection is a way of *not* dealing with the problem" (emphasis in original).[18] Essentially, reporting how many cases are declined is not an effective measure to ensure that cases are prosecuted since compiling statistics and declination reports do nothing to address sexual violence at its source.

While "consulting" Native nations may be a step in the right direction, the Act does little to make Native nations full partners in the law. Again, though Native nations are to be "consulted" as the law is implemented, many of the aspects of the law that involve coordinating Native people do not actually involve Native people. For example, a central tenet of the TLOA is facilitating the adjudication of crimes that occur in Indian country between the federal, state, and tribal governments. To do this, the TLOA establishes the Office of Tribal Justice and creates several liaison positions to increase communication between these entities. Unfortunately, these positions are to be filled by assistant U.S. attorneys appointed by the U.S. attorney in each district that includes Indian country.[19] Rather than providing for Native nations to appoint their own liaisons that represent their nation's best interests, the TLOA insists on appointing more U.S. attorneys who may not be in touch with the needs of the Native community in that area, or accountable to the Native communities that they serve. Again, while creating these positions and consulting with Native nations may be seen as an improvement, it still highlights a common theme: while the federal government may intend to incorporate Native people in crafting solutions in Indian country, it continues to insist on centering itself in the formation and maintenance of these solutions.

Additionally, many Native women have called the funding for the Act into question. While the TLOA ostensibly makes millions of dollars available for Native nations to invest in their tribal justice systems, many remain skeptical as to whether or not this funding will actually become available. As Kimberly Craven

(Sisseton–Wahpeton Oyate) writes in an editorial in the *Indian Country Times*, "It is critical that Congress also appropriate the money that is needed to implement this law. Until that is done, these are probably just words on a piece of paper."[20] Virgil Wade, a criminal defender in the Salt River Pima-Maricopa Indian Community says, "I don't know that it has the teeth that it's going to need," referring to the fact that the funds to pay for the TLOA aren't guaranteed.[21] The skepticism towards fund allocation is warranted. For example, as Muskogee activist Sarah Deer points out, the Tribal Justice Act of 1993 was supposed to provide over fifty million dollars *per year* for tribal justice systems, yet when the act expired seven years later, only five million dollars had been appropriated *in total*.[22]

Appropriating funds for the TLOA can be problematic, not only because funding for the Act is not guaranteed, but also because, as with all federal grants, tribal nations must apply for them. This places Native nations in a position where they must meet certain—and often hegemonic—standards for fund allocation. While the TLOA does allow funds to be used for "alternatives to incarceration," the Act dedicates a large part of its funding towards the construction of new juvenile and adult detention facilities.[23] Other sections of the Act authorize grants for the purchase of police equipment such as weapons.[24] In this way, funding for Native nations is framed in terms of increased resources for Western-style law-and-order systems that value punishment and incarceration, along with increased police presence to guarantee safety. As Native activist Jessica Yee (Mohawk) notes:

> A thing that somewhat troubles me about the bill is a lot [sic] on criminalization and penalization. I'm a prison abolitionist in many senses and I'm very aware of how many Indigenous people are in the criminal justice system unfairly; but more importantly, that these entire systems are not our laws and not our systems.[25]

Here, many Native women agree that increased state violence will not help eradicate violence caused by the state. As one Native woman so succinctly noted, "We can't arrest our way out of this problem."[26]

Western Legal Hegemony

In addition to increased funding for police weaponry and detention facilities, the TLOA grants Native nations greater authority to make arrests, sentence perpetrators, and access national criminal databases. This is important because tribal police will now be able to run background checks to determine if someone is a convicted criminal or sex offender. However, access to these systems is predicated on tribal police becoming "consistent with standards" accepted by the federal government.[27] In other words, tribal police must subscribe to hegemonic standards of Western law enforcement procedures in order to have access to this vital information. Furthermore, while the Act encourages agreements between tribal law enforcement officers and local police, this is at the discretion of the attorney general who "may provide technical and other assistance to state, tribal, and local governments" to enter into "mutual aid, hot pursuit of suspects, and cross-deputization agreements."[28] While the TLOA is ostensibly about encouraging cooperation between the federal, state, and tribal entities, it does so with a top-down approach by appointing attorneys and federal liaisons to oversee relationships, rather than directly addressing cooperation on an everyday level. And the only section of the Act to directly address coordination between tribal and local police dictates that it will be at the attorney general's discretion. Here, the only way that tribal police officers may arrest non-Native assailants is through entering into a cross-deputization agreement with local authorities. Cross-deputization has been problematized by many Native women, notably Eileen Luna-Firebaugh (Choctaw/Cherokee), who notes that they force tribal police to adhere to Western legal standards in order to be seen as legitimate by local authorities.[29] In order for tribal police to exercise even a modified form of jurisdictional and local control under the TLOA, non-Native law enforcement officers must train and certify them. Here non-Native law enforcement agencies are modeled as ideal, thereby implying the inferiority of Native justice systems.

In addition to forcing Native nations to ascribe to Western notions of justice, the way that the TLOA structures sentencing authority is an example of the ubiquitous fear of Native justice systems that structures federal Indian policy. In 1968, the federal government imposed mandatory sentencing restrictions on tribal governments under the Indian Civil Rights Act of 1968 (ICRA).[30] Stemming from federal paternalism to protect Native people from their own governments, the ICRA initially limited tribal governments to imposing sentences of no more than six months in jail and a $500 fine per offense on those who were convicted in tribal court. The TLOA increased these limitations to three years and $15,000 respectively.[31] However, in order to hand down sentences in excess of one year and a $5,000 fine, the Tribal Law and Order Act states that a tribal court must provide the defendant with counsel "at least equal to that guaranteed by the United States Constitution," who is licensed to practice law in the United States, and that the judge presiding over the trial must also be licensed in the United States. All of this must be "at the expense of the tribal government."[32] Not only do sentencing limitations indicate the federal perception that Native people must be protected from their own governments, but the fact that in order to even operate within these limitations tribal nations must also subscribe to Western hegemonic systems of

justice, demonstrates that the federal government clearly does not intend to invest in tribal sovereignty in a meaningful way. As one Native woman in an *Indian Country Today* editorial blog observed:

> This piece of legislation contains sections that once again diminish tribal sovereignty! Tribes can only increase incarceration IF they provide certain protections for defendants. Specifically, judges and public defenders must be lawyers. Also, they must follow American legal procedures. Not all tribes currently provide these types of services in their tribal court systems, neither do they have the resources to comply with these requirements. Once again, another example of the guardian ward relationship being reinforced [emphasis in original].[33]

Another woman, identifying as Turtle Mountain Ojibwe observed:

> I applaude [sic] the passing of the new Law and Order Act for Indian country, however after reading through the act more carefully, discovered that in order for tribes to pass and enact this new Bill we once again lost more of our sovereignty. According to this ACT [sic], tribes who decide to implement this new Law and Order Act are required to follow State law and court procedures, rather then [sic] tribal laws and court procedures. Just one more example of the Federal Government taking our rights away in the disguise of helping, what a shame, but to be expected.[34]

In these quotes, Native women problematize the relationship between the federal government and Native nations as one that has been marked by paternalism and attacks on tribal sovereignty. Again, we see the common theme that Native governments become legitimate only when they become more like the hegemonic ideal of Western government. Despite stating that tribal justice systems are the best place to adjudicate crimes in Indian country, the TLOA frames them as effective only when these systems are shaped to mirror American models. Additionally, the fact that tribes are forced to pay the cost of conforming to Western justice systems leads many Native women to refer to the TLOA as an "unfunded mandate."[35] Furthermore, there is a provision under the increased sentencing section of the TLOA that describes how after four years the attorney general will recommend, "whether enhanced sentencing authority should be discontinued, enhanced, or maintained at the level authorized under this title."[36] In other words, once the federal government determines whether or not tribes have been "effective"[37] in their use of enhanced sentencing laws, the federal government will paternalistically decide whether or not they should be allowed to continue to have increased sentencing authority.

As Chapter Three demonstrated, federal law and policy has sought to manage the "Indian problem" by delivering Native people out of savagery and into

civilization. So far we have seen how the TLOA views "strengthening tribal justice systems" as synonymous with using federal funding to force tribal justice systems to mirror Western government, and that after a period of time the federal government will assess whether or not tribal governments can be trusted with increased responsibility. This not only reveals a paternal narrative, but also a civilizing one. From a federal perspective, the TLOA's efficacy is framed in part through its potential to create competency in tribal justice institutions through federal intervention. This by definition assumes the inherent *in*competency of tribal justice as it exists now, and places the TLOA on the colonial legal trajectory of using federal Indian policy to manage the "Indian problem" through Western law as a civilizing force.

Assimilation as part of the civilizing project of federal Indian policy is found throughout the non-Native legislative discourse around the TLOA. Rather than framing sexual violence as the direct result of colonization and the formation of the United States, sexual violence originating in Indian country is often divorced from its colonial context. Framed paternalistically in terms of delivering Native people into the safety of the America dream, the rhetoric around the TLOA is characterized by phrases such as all Native people deserve to enjoy the "fullest protection of *our* laws,"[38] (my emphasis) and that "every American has the right to live in a safe community," even our "First Americans."[39] At the 2009 Tribal Nations Conference where he announced his support for the TLOA, President Obama emphasized his commitment to the nation-to-nation relationship between Native nations and the federal government so that tribes can "be full partners in the American economy, and so your children and grandchildren can have an equal shot at pursuing the American Dream."[40] While this type of rhetoric may sound pro-Indian, it fails to be truly pro-sovereignty. As many Native scholars point out, the American economy could not have been built without the colonization of Native people, and as such, realizing the "American Dream" is not always a goal of Native peoples.[41] Additionally, framing the TLOA as something that gives Native people the fullest protection of American laws demonstrates the failure of the federal government to understand that federal laws have actually *created* the impunity through which Native women are preyed upon in Indian country. What many in the Native community are demanding is not equal protection *under* American law, but the right to protect themselves *from* American law, through self-determination and sovereignty over their own lands, laws, and justice systems.

Additionally, many in the Native community are skeptical of being forced to adopt a Western justice model that appears to be dysfunctional by its own standards. As noted in Chapter One, Cherokee scholar Andrea Smith argues that the Western criminal justice system generally functions at the point of crisis *after*

violence has occurred.[42] And Sarah Deer (Muscogee Creek) notes, "I'm always concerned about 'law and order' language. It certainly doesn't protect or help white women, so it's not going to help Native women. We have to make sure that the systems we set up are Native women-centered."[43] Full inclusion and equal protection under the law of the very institution that has divested Native people of their lands and resources are not necessarily the goals of Native communities. While the federal government may continue its mission to deliver Native people into civilization by incorporating them into American legal hegemony, Native communities articulate solutions in terms of sovereignty and centering Native women in their anti-violence strategies.

The Homogenization of Violence: Racial Identity and Predatory Violence

As this chapter indicates, while the TLOA is framed as being liberatory for Native people, it is in fact deeply hegemonic and fits within a narrative of federal paternalism. Yet this analysis stands apart from what is by far the most problematic aspect of the TLOA. Despite admitting that "tribal nations are the best place to handle issues of tribal law and order," and despite the fact that specific pieces of federal Indian law and policy have clearly created jurisdictional conflicts, the TLOA does absolutely nothing to address these policies or address the dynamics of interracial violence that characterize the majority of sexual assault against Native women.

The TLOA specifically acknowledges that more than one in three Native women will be raped in her lifetime and that violence against Native women is 2.5 times that of the national average.[44] American politicians quote these statistics in virtually every speech as they pledge their support of the TLOA. But despite being published in many of the same reports that reveal these startling facts, one statistic you will not find in federal political discourse is the fact that while rape is an overwhelmingly intra-racial crime in the United States, 86% of Native women who are raped report that their attacker is a non-Native man, 80% of whom are white. If politicians were to acknowledge that interracial rape is rare in non-Native communities yet routine for Native women, they would be forced to address the history that has created these disparate statistics. However, doing so would require a discussion of American colonization and is thus inconvenient to the settler-state. As such, the interracial aspect of sexual violence and jurisdictional conflicts is never addressed. While truly addressing jurisdictional conflicts would mean crafting legislation that bolsters a Native nation's ability to address *all* violence against Native women, the TLOA instead focuses on strengthening tribal policing of the

mere 14% of *intra*-racial sexual assault in Indian country. In ignoring the interracial aspect of sexual violence against Native women by racing the perpetrators of violence in Indian country as Native, the TLOA both strengthens tribal justice systems to police and incarcerate their own Native people disproportionately while continuing to deny Native nations the authority to exercise control over those who commit the vast majority of sexual assault against Native women.

One of the cornerstones of the TLOA is "strengthening tribal justice systems," accomplished primarily through increased funding for policing and prisons. However, because the Tribal Law and Order Act does not overturn *Oliphant*, all of the funding that would go to tribal governments under the TLOA would—by definition—only be used to police Native people. Here, all of the federal money used to "strengthen tribal justice systems" would specifically go to prosecuting and incarcerating Native people exclusively. As Native scholar Luana Ross points out, the criminalization of Native identity and legacies of historical trauma have led to an astounding over-representation of Native people in the criminal justice system as it is.[45] The TLOA would then only invest in tribal justice systems to the extent that they might further police and jail their own members, while doing little to address the root causes and realities of sexual violence against Native women.

Despite the fact that virtually every scholar points to federal Indian policy like the Major Crimes Act, the Dawes Act, Public Law 280 and *Oliphant v. Suquamish* as the cause of jurisdictional conflicts in Indian country, the TLOA refuses to address them. In fact, the Act *protects* and *strengthens* pre-existing law and policy by amending the Indian Civil Rights Act and by explicitly protecting the ruling in *Oliphant*. Without mentioning the case by name, Section 206 removes any doubt over the TLOA's impact on *Oliphant* by stating, "Nothing in this Act confers on an Indian tribe criminal jurisdiction over non-Indians."[46] In doing so, Section 206 affirms *Oliphant* as case law and reiterates the federal government's position that state and/or federal entities are the true arbiters of justice for the majority of crimes committed against Native women in Indian country.

Because the TLOA explicitly protects the root causes of jurisdictional conflicts, it can never adequately address them. Instead, the TLOA appears to be another case of legislating over the problem, rather than addressing it directly. This fits neatly into the master narrative of federal policy in which the government enacts a series of reactive policies out of a fear of Native justice systems, rather than meaningfully investing in these systems. As Native women and Native communities conceptualize the TLOA, they often comment on this tendency. For example, Diane Enos, president of the Salt River Pima-Maricopa Indian Community in Arizona, states of the TLOA, "You've got Congress people scared stiff of seeing tribes get authority over non-Indians. I'm not sure that they understand why, but

it's almost a knee-jerk reaction."[47] As Native activist Sarah Deer notes of the passage of the TLOA:

> I should just be satisfied with celebrating this victory, but I'd really like to see Congress take on this issue of non-Indian perpetrators [...] I think there's a fear that tribal governments will be harsher on non-Indians. I think that's a racist idea at its core [...] the idea that tribal people can't be fair. If you take racism out of the picture, then what the rule is doesn't make sense.[48]

Both Deer and Enos's statements frame true solutions to jurisdictional conflicts and sexual violence in terms of investments in tribal sovereignty, while positioning the TLOA as reactive to the fear of Native justice systems. Noting the reactionism and fear that characterizes aspects of the TLOA, Native women and Native community members consistently incorporate an analysis of sovereignty into their perceptions of the TLOA. As Rose from South Dakota comments in *Indian Country Today*:

> I feel confident the tribes can handle their own affairs and what would happen if we went to Senator Dorgan's home state and tried to enforce a law upon the citizens? It's so tragic for the Indian Nations. This is just another pretext of repressive policy and example of the guardian-ward relationship.[49]

Furthermore, Tsoo'woo Naibi comments in *Indian Country Today*:

> We are a strong people whose heritage is based on a balance between individual autonomy and strong community ties. We still have the power to achieve this, and can better achieve it if the U.S. steps out of our affairs.[50]

At the Tribal Nations Conference of 2009 when President Obama announced his intentions to sign the TLOA, he stated, "I believe that Washington can't—and shouldn't—dictate a policy agenda for Indian country. Tribal nations do better when they make their own decisions. That's why we're here today."[51] Yet one is left to wonder if a TLOA that purports to invest in tribal justice systems, and notes that tribes are the best institutions to maintain law and order in Indian country, actually incorporates the kind of self-determination that President Obama claims to support. At every turn Native women and Native communities articulate that sovereignty and self-determination is absolutely vital in shaping a better future for themselves. Yet the TLOA insists on continuing to invest in the "guardian"/"ward" relationship codified in the 1830s that defined Native people as child-like "wards"[52] of the paternal federal government.

Like federal Indian policy before it, the TLOA acts out of a colonial fear of the inferiority of tribal justice systems and paternalistically dictates the ways in which Native nations may exert authority over the people and activities on their land while increasing state violence against Native people through policing and incarceration. Despite President Obama's promise that "this time it would be different," it appears that the TLOA still embodies many of the problems of traditional federal Indian policy that sought to manage the "Indian problem" by divesting in Native sovereignty and investing in American hegemony. While the Act reveals an understanding of the issue that is congruent with the findings of this research—that sexual violence against Native women in Indian country has reached epidemic proportions and that jurisdictional conflicts play a major role in this violence—the solutions proposed in the TLOA do little to address the problem at its core. Instead, the federal government continues to vest federal and state authorities—often the most distant, unresponsive, and unaccountable entities—with jurisdictional authority over crimes in Indian country. At the same time, the interracial aspect of sexual assault is erased, as the federal government refuses to acknowledge its role in the creation and maintenance of these conflicts.

Despite the obvious shortcomings of this Act, it would be a mistake to universally condemn it. In spite of its limitations, Native women and Native organizations also offer praise of the TLOA. Native women like Lisa Iyotte, whose story we heard at the beginning of this chapter, describe how this act can help prevent cases from "falling through the cracks." Jessica Yee, a Native blogger for Ms. Magazine stated "As a Native feminist without apology, I'm thrilled that the Tribal Law and Order Act of 2010 has been passed to protect Native women from violence."[53] Other Native women have stated "I think now the women finally have a voice [...] I sit with women who cry and are mad because the feds didn't want to pick up the case. This bill, I think, would give women more of a right [...]"[54] These statements do not come as a result of ignorance of the true content of the Act, but instead support for the TLOA comes from a willingness to engage in what Chela Sandoval refers to as a "differential consciousness."

In *Methodology of the Oppressed*, Sandoval argues that social movements are often framed with an either/or approach of choosing one organizing strategy over another.[55] In the either/or paradigm, organizing within competing power structures often positions women as having to choose between adversarial approaches to social change. However, what Sandoval engages in *Methodology* is the idea that women of color can and do negotiate seemingly oppositional power structures, refusing to choose one or the other. Instead, they strategically navigate opposing spaces with a willingness to engage in multiple approaches even if these approaches may at first appear to conflict.[56] She refers to this type of consciousness as a "differential" in

that it "enables movement 'between and among' ideological positionings."[57] Much like a transmission differential in a car, activists can shift between different approaches in the face of changing terrain to strategically navigate contemporary institutions to shape a better world for themselves and their communities. So rather than completely embrace the TLOA as the ultimate solution to sexual violence and jurisdictional conflicts, or alternatively reject the TLOA as worthless because it fails to frame solutions in ways that are truly liberating for Native communities, Native women invoke a differential consciousness to leverage the potential benefits of the TLOA while also acknowledging and addressing its shortcomings.

We see differential consciousness employed by many Native women as they discuss the TLOA. As Nicole Mathews (White Earth Ojibwe), executive director of the Minnesota Indian Women's Sexual Assault Coalition stated, "I think that the Obama administration has really taken some great steps to improve safety for Native women in Native country [...] But there is more work ahead. Now we have to take steps to make it a reality."[58] Lucy Simpson (Navajo) an attorney for the Indian Law Resource Center continues, "The Tribal Law and Order Act that Obama just passed provides a little step in the right direction."[59] Muscogee activist Sarah Deer states, "[T]his took three years. It's really been 500 years, but three years of putting it on paper. There are ten or twelve more steps we need to do, of course, but now it feels like we can change the world." She goes on to say, "This [Act] is a very, very tiny beginning, but now I really believe it can be done. I don't know if I will see it in my lifetime, but I'm committed to making sure I do the work anyway."[60] In another piece, she also states, "I see the [TLOA] as a foundation [...] I worry sometimes that people expect a 'quick fix' to problems that have been ongoing for over a century. While the TLOA didn't contain all the fixes (or dollars) that would be ideal, we now have a starting point."[61]

By invoking a differential consciousness, Native women conceptualize the TLOA, not as a "quick fix," but instead as a framework from which they can base future activism both within *and* outside of existing institutions. These Native women acknowledge that there is still much more work to be done, but rather than reject a piece of legislation because it is problematic, they are willing to strategically leverage it to shape a better future. While many acknowledge that solutions to sexual violence in Indian country will likely not come from the very government that has consistently inscribed violence on Indian people, it doesn't necessarily preclude Native activists from using each potential asset as they work to create a world that is safe for Native women. And, as we look at other sites of activism, this ability to invoke a differential consciousness becomes central to framing solutions to jurisdictional conflicts and sexual violence.

Notes

1. Barack Obama. "Remarks By the President Before Signing the Tribal Law and Order Act." Office of the Press Secretary. The White House. 29 Jul. 2010. Print.
2. Lisa Iyotte. "Remarks Before Signing of the Tribal Law and Order Act." The White House. Washington, D.C. Video. 29 Jul. 2010. <http://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women> Accessed 12 Apr. 2011.
3. Ibid.
4. Obama, "Remarks by the President."
5. Non-Native advocates include Representative Herseth-Sandlin of South Dakota, Senator Byron Dorgan of North Dakota, the American Bar Association, and Amnesty International. Native advocates include Sarah Deer and Native community organizations like the Qualla Women's Justice Alliance, Strong Hearted Native Women's Coalition, Inc., and Mending the Sacred Hoop Technical Assistance Project. See Congressional Senate Hearing, "Examining S. 797, The Tribal Law and Order Act of 2009," 111th Congress. First Session. (Washington, D.C.: GPO, 2009) Print.
6. See for example Angela Chang of Amnesty International, "Victory! Tribal Law and Order Act Passes in the US Senate!" *Amnesty International USA Web Log*. Web. 1 Jul. 2010. <http://blog.amnestyusa.org/women/victory-tribal-law-and-order-act-passes-in-the-us-senate/> Jul 1 2010> Accessed 12 Apr. 2011.
7. Ibid.
8. See the work of Laura Sullivan of National Public Radio, Michael Riley of *Denver Post* and Current TV's *Vanguard* documentary "Rape on the Reservation" Jun. 2010.
9. Tribal Law and Order Act. Pub L. No 111-211. 29 Jul. 2010. Sec. 202.a.1–7.
10. Ibid., 202.b.1–6.
11. Tribal Law and Order Act.
12. Ibid.
13. See for example Senate Committee hearing *Examining S. 797*.
14. The TLOA uses the phrase "in consultation with Indian tribes" throughout the Act. See for example Sec 211.f.3, Sec 231.b.i.
15. Tribal Law and Order Act. Sec. 202.b.3.
16. Representative Tom Cole (Chickasaw) of Oklahoma's 4th district was the only member of the 111th Congress enrolled in a federally recognized tribe. ("111th Congress: Statistically Speaking," *CQ Today*. 6 Nov. 2008. Web. Accessed 12 Apr. 2011 <www.cq.com/graphics/monitor/.../mon20081105-5election-stats.pdf>
17. "Our Input Still Needed in Law and Order Act," *Indian Country Today*. Web. 2 Sep. 2010. <http://www.indiancountrytoday.com/internal?st=print&id=102101183&path=/opinion.editorials> Accessed 12 Apr. 2010.
18. As quoted in Mac McClelland, "A Fistful of Dollars," *Mother Jones* Nov-Dec. 2010: 65.
19. Tribal Law and Order Act. Sec. 13.a.
20. Article comment by Kimberley Craven, 30 Jul. 2010 in Gale Toensing, "Obama Signs 'Historic' Tribal Law and Order Act." *Indian Country Today*. Web. 30 Jul. 2010. <http://www.indiancountrytoday.com/home/content/Obama-signs-historic-Tribal-Law-and-Order-Act-99620099.html> Accessed 12 Apr. 2011.

21. McClelland, "Fistful of Dollars."
22. Deer, "Federal Indian Law and Violent Crime" 40.
23. Tribal Law and Order Act. Sec. 211.f.1.c.
24. "Summary of the Tribal Law and Order Act." United States Senate Committee on Indian Affairs. Mar. 2009. Web. Accessed 4 Oct. 2010. <www.indian.senate.gov/public/_files/TLOonepagerMar2009.pdf>
25. Jessica Yee, "How Native Women Built the Tribal Law and Order Act," *Ms. Magazine Blog* Web. 3 Aug. 2010. <http://msmagazine.com/blog/blog/2010/08/03/the-woman-behind-the-tribal-law-and-order-act> Accessed 12 Apr. 2011.
26. Pember, "Tribes Gain New Clout."
27. Tribal Law and Order Act. Sec. 231.a.1.B.i.
28. Ibid. Sec. 222.
29. Luna-Firebaugh, *Tribal Policing* 40.
30. The Indian Civil Rights Act (ICRA) of 1968 imposes many of the amendments in the U.S. Bill of Rights onto Native nations. While framed as benevolently granting the full protection of American laws to Native peoples, the ICRA inscribed Western hegemonic justice systems in Native communities. See Steven Pevar as quoted in Deer, "Federal Indian Law and Violent Crime" 35.
31. Tribal Law and Order Act. Sec. 234.C.
32. Ibid., Sec. 234.b.1–3.
33. Article comment by Honorindians, 31 Jul. 2010 in Toensing, "Obama Signs 'Historic' Tribal Law and Order Act."
34. Article comment by J. Charette (Turtle Mountain Ojibwe), 31 Jul. 2010. Ibid.
35. See for example Rosa Maria Cortez, senior attorney with the Navajo Nation: "We see [the TLOA] as an unfunded mandate." From "Tribes Question 'Unfunded Mandate' From Tribal Law and Order Act," *indianz.com* Web. 27 Aug. 2010. <http://64.38.12.138/News/2010/021398.asp accessed> Accessed 12 Apr. 2011.
36. Tribal Law and Order Act. Sec. 234.b.2.
37. Ibid., Sec. 234.b.1.
38. Obama stated that by passing the TLOA "I intend to send a clear message that all of our people—whether they live in our biggest cities or our most remote reservations—have the right to feel safe in their own communities, and to raise their children in peace, and enjoy the fullest protection of our laws." From Obama, "Remarks By the President."
39. Quoting Senator Byron Dorgan in Rob Capriccioso, "Tribal Law and Order Act Costly," *Tribune Business News* 28 Jul. 2010.
40. Remarks of President Obama at the White House Tribal Nations Conference of 2009. From Kimberly Teehee, "Forging a New and Better Future Together," Office of Public Engagement. The White House. Web. 21 Jul. 2010. <http://www.whitehouse.gov/blog/2010/06/21/forging-a-new-and-better-future> Accessed 12 Apr. 2011.
41. See for example the work of Haunani-Kay Trask, e.g. "Settlers of Color and 'Immigrant' Hegemony: 'Locals' in Hawai'i." *Amerasia Journal.* UCLA Asian American Studies Center Press. 26.2 (2000): 1–24.
42. Smith, *Conquest.* 169.
43. Yee, "How Native Women Built the Tribal Law and Order Act."

44. Tribal Law and Order Act. Sec. 202.
45. Ross, *Inventing the Savage.*
46. Tribal Law and Order Act. Sec. 206.
47. Jenny Gold, "Bill Bolsters Tribal Power to Prosecute Rape Cases," *National Public Radio.* 23 Jul. 2008.
48. Paul Schmelzer, "Overdue Indian Crime Bill Passes Without Support of Colo. Republicans," *Colorado Independent* Web. 28 Jul. 2010. <http://coloradoindependent.com/58201/overdue-indian-crime-bill-passes-without-support-of-colo-republicans> Accessed 12 Apr 2011.
49. Article comment by Rose 30 Jul. 2010 in Toensing, "Obama Signs 'Historic' Tribal Law and Order Act."
50. Article comment by Tsoo'woo Naibi, 30 Jul. 2010. Ibid.
51. Remarks by President Barack Obama in "Forging a New and Better Future Together: 2010 White House Tribal Nations Conference Progress Report." The White House. 23 Jun. 2010. Print.
52. See specifically *Cherokee Nation v. Georgia* (1831) in which U.S. Supreme Court Chief Justice John Marshall referred to Native people as "wards" of the U.S. government. *Cherokee Nation* along with *Johnson v. M'Intosh* (1823) and *Worcester v. Georgia* (1832) comprise the "Marshall Trilogy" of Supreme Court cases that form the foundation of federal Indian policy.
53. Yee, "How Native Women Built the Tribal Law and Order Act."
54. Georgia Littleshield, director of the Pretty Bird Woman House domestic violence shelter on the Standing Rock Sioux reservation in South Dakota. Quoted in Gold, "Bill Bolsters Tribal Power to Prosecute Rape Cases."
55. Chela Sandoval, "U.S. Third World Feminism: Differential Social Movement I," *Methodology of the Oppressed* (Minneapolis: University of Minnesota Press, 2000): 40–63.
56. Sandoval, *Methodology of the Oppressed* 57–60.
57. Ibid., 57.
58. Quoted in Sheila Regan, "Tribal Law and Order Act's XI Addresses Indian Women Sexual Assault Issues," *Twin Cities Daily Planet.* Web. 27 Oct. 2010. <http://www.tcdailyplanet.net/news/2010/10/11/tribal-law-and-order-act%E2%80%99s-xi-addresses-indian-women-sexual-assault-issues> Accessed 12 Apr. 2011.
59. Quoted in Jeanette Fordyce, "Safe Women, Strong Nations Project Combats Rape on Reservations," *Twin Cities Daily Planet.* 3 Aug. 2010. Web. <http://www.tcdailyplanet.net/news/2010/08/02/safe-women-strong-nations-project> Accessed 12 Apr. 2011.
60. Quoted in Yee, "How Native Women Built the Tribal Law and Order Act."
61. Quoted in Pember, "Tribes Gain New Clout."